Law Periodicals - British Year Book

University of London

SHL WITHDRAWN

Digitized by the Internet Archive
in 2026

https://archive.org/details/british-yearbook-of-international-law_1933_14

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW

Issued under the auspices of the Royal Institute of International Affairs

THE
BRITISH YEAR BOOK OF INTERNATIONAL LAW
1933

FOURTEENTH YEAR OF ISSUE

HUMPHREY MILFORD
OXFORD UNIVERSITY PRESS
London Edinburgh Glasgow Leipzig
New York Toronto Melbourne Capetown
Bombay Calcutta Madras Shanghai

EDITORS

PROFESSOR A. PEARCE HIGGINS
PROFESSOR J. L. BRIERLY

EDITORIAL COMMITTEE

W. E. BECKETT
PROFESSOR J. L. BRIERLY
A. P. FACHIRI
PROFESSOR H. C. GUTTERIDGE
PROFESSOR A. PEARCE HIGGINS
SIR CECIL HURST
A. D. McNAIR
SIR WILLIAM MALKIN
P. J. NOEL-BAKER
PROFESSOR H. A. SMITH
SIR JOHN FISCHER WILLIAMS

ASSISTANT EDITOR

MISS A. DOUGHERTY

CORRESPONDENTS

AUSTRALIA: PROFESSOR A. H. CHARTERIS, University of Sydney, Sydney, N.S.W.
SIR ROBERT GARRAN, Orphir, St. George's Road, Toorak, Melbourne.
CANADA: PROFESSOR NORMAN McKENZIE, University of Toronto, Toronto.
NEW ZEALAND: W. H. COCKER, Wyndham Street, Auckland.
SOUTH AFRICA: PROFESSOR ERIC EMMETT, The University, Capetown.
PALESTINE: PROFESSOR NORMAN BENTWICH, The Hebrew University, Jerusalem.
UNITED STATES OF AMERICA: PROFESSOR J. W. GARNER, University of Illinois, Urbana, Ill.

Editorial Communications should be addressed to—

THE SECRETARY,
THE BRITISH YEAR BOOK OF INTERNATIONAL LAW,
THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS,
CHATHAM HOUSE,
10 ST. JAMES'S SQUARE, S.W. 1.

The Members of the Editorial Committee do not make themselves in any way responsible for the views expressed by the writers of articles, whether those articles are signed or unsigned.

PRINTED IN GREAT BRITAIN

BIBL.
LONDIN.
UNIV.

CONTENTS

THE DISSOLUTION OF FOREIGN CORPORATIONS IN PRIVATE INTERNATIONAL LAW IN THE LIGHT OF THE "RUSSIAN BANK CASES" . . 1
By B. A. WORTLEY

THE RULE OF UNANIMITY: THE PRACTICE OF THE COUNCIL AND ASSEMBLY OF THE LEAGUE OF NATIONS 18
By JULIUS STONE, B.A., B.C.L., LL.M., S.J.D.

THE REVISION OF INTERNATIONAL LABOUR CONVENTIONS . . 43
By C. WILFRED JENKS

✓ THE STIMSON DOCTRINE OF NON-RECOGNITION—A NOTE ON ITS LEGAL ASPECTS 65
By ARNOLD D. MCNAIR, C.B.E., LL.D.

AN INTERNATIONAL CODE OF THE LAW OF SALE 75
By H. C. GUTTERIDGE, K.C., LL.D.

THE END OF THE CAPITULATORY SYSTEM 89
By NORMAN BENTWICH, M.A.

✓ STATE IMMUNITY FROM PROCEEDINGS IN FOREIGN COURTS . . 101
By G. G. FITZMAURICE

BOYCOTT IN INTERNATIONAL RELATIONS 125
By H. LAUTERPACHT, LL.D.

NOTES:

The Revision of the Hague Convention (No. X of 1907) for the adaptation of the principles of the Geneva Convention to Naval Warfare . . . 141
The "Committee of Experts on Article 408" 143
The Oil Pipe-Line and the Mandates 145
– British Commonwealth of Nations—Settlement of Disputes . . . 146
✓ The Greenland Case 146
Reports of the Decisions of the Permanent Court of International Justice . . 147
Permanent Court of International Justice 147
Canadian Cases 148
Treaties and Acts of Congress 150
Extradition—The Insull Case 150
Right of a State to require Return of Citizen from Abroad to give Testimony in the Courts 151
Admiralty Court—Power to Decline Jurisdiction 152
The Convention for limiting the Manufacture and regulating the Distribution of Narcotic Drugs 153
✓ The Doctrine of the Contiguous Zone and the Dicta in Croft *v.* Dunphy . . 155
Institute of International Law 157
International Law Association 158
The Grotius Society 158

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS:

Judgments and Advisory Opinions of the Permanent Court of International Justice 160
An Arbitration Case between the United States and Sweden . . . 180
Arbitration of Sabotage Cases in the United States 181

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW:

Decisions of the English Courts during the Year 1932 183

Reviews of Books:

Académie de Droit International: Recueil des Cours, 1931 204
Annual Digest of Public International Law Cases 1919–22 . . . 204
Hagerup, Francis: *Folkerett i Fredstid* 205
Bartin, E.: *Principes de droit international privé* (2nd volume) . . . 206
Eagleton, Clyde: *International Government* 207
Makarov, A. N. and Schmitz, Ernst: *Fontes Juris Gentium* . . . 208
Fachiri, A. P.: *The Permanent Court of International Justice* . . . 208
Gavrilović, Stojan: *L'Organisation des Commissions de Conciliation d'après les Traités suisses* 209
Gidel, Gilbert: *Le Droit International Public de la Mer* 209
Gouet, Yvon: *La Coutume en droit constitutionnel interne et en droit constitutionnel international* 211
Hold-Ferneck, Alexander: *Lehrbuch des Völkerrechts* 211
Kauffmann, Siegmund: *Die Immunität der Nicht-Diplomaten: ein Beitrag zur Kodifikation des Völkerrechts* 212
Lewald, Hans: *Das deutsche internationale Privatrecht auf Grundlage der Rechtssprechung* 212
Raape, Leo: *Internationales Privatrecht* 212
Nussbaum, Arthur: *Deutsches internationales Privatrecht* 212
Melchoir, Georg: *Die Grundlagen des deutschen internationalen Privatrechts* . 212
McNair, Arnold D.: *The Law of the Air* 214
Masters, Ruth D.: *International Law in National Courts* 214
Rebbe, Walter: *Der Lotusfall vor dem Weltgerichtshof* 215
Reid, Helen Dwight: *International Servitudes in Law and Practice* . . 215
Satow, Sir E.: *A Guide to Diplomatic Practice* 217
Simoes, Raul Humberto De Lima: *Vers la Paix Organisée* . . . 218
Smith, Herbert Arthur: *Great Britain and the Law of Nations* . . . 218
Spaight, J. M.: *An International Air Force* 219
Stone, Julius: *International Guarantees of Minority Rights* . . . 219
Keith, A. Berriedale: *Dicey's Conflict of Laws*, 5th Edition . . . 220
Haase, Joachim: *Wandlung des Neutralitätsbegriffes* 221
Martini, Peter Albert: *Blockade im Weltkrieg* 221
Krämer, F.: *Das Verhältnis der französischen Bündnisverträge zum Völkerbundpakt und zum Pakt von Locarno* 221
Niemeyer, H. G.: *Einstweilige Verfügungen des Weltgerichtshofs, ihr Wesen und ihre Grenzen* 222
Röttger, M.: *Die Voraussetzungen für die Anwendung von Völkerbund-zwangsmassnahmen* 222
Winkler, Carl Heinz: *Verträge in Gunsten und in Lasten Dritter im Völkerrecht* . 223
Dunn, Frederick Sherwood: *The Protection of Nationals. A Study in the application of International Law* 223
Guggenheim, Paul: *Der Völkerbund: Systematische Darstellung seiner Gestaltung in der politischen und rechtlichen Wirklichkeit* 224

Reviews of Current Periodicals:

The American Journal of International Law, 1932 (Vol. XXVI) . . . 225
Revue Générale de Droit International Public, Tome VI, 1932 . . . 226
Journal du Droit International, Tome LIX, 1932 229
Revue de Droit International et de Législation Comparée, Tome XIII, 1932 . 227
Zeitschrift für öffentliches Recht, Band XII, 1932 228
Niemeyers Zeitschrift für internationales Recht. Vols. XXXV and XXXVI . . 227
Rivista di Diritto Internazionale, 1932 230
The Journal of Comparative Legislation and International Law, Vol. XIV, 1932 . 231

Bibliography 232

Index 243

THE DISSOLUTION OF FOREIGN CORPORATIONS IN PRIVATE INTERNATIONAL LAW[1] IN THE LIGHT OF THE "RUSSIAN BANK CASES"

By B. A. WORTLEY, a member of the staff of the Law Department, London School of Economics.

I

RUSSIAN banks have traded in England before, during, and after the Soviet Revolution, and it would seem from a perusal of the Law Reports that those in charge of English branches of Russian banks have occasionally carried on business here while the fate of the parent bank, incorporated in Russia, has been undecided and often unascertainable with any precision.

Numerous difficulties with regard to the existence of assets and debts here, after the legal extinction of Russian companies in Russia, would have been, for the most part, avoided, if only the English branches had been separately incorporated here when they were opened. The foreign parent company might in each case have controlled the English subsidiary by retaining the greater part of the voting power in or the right to appoint directors of such subsidiary. The dissolution of the controlling body would not then have put any technical difficulties in the way of the English subsidiary suing and being sued, or with regard to the process of the liquidation thereof. This, at any rate, is one practical lesson to be drawn from the "Russian Bank Cases". But the main purpose of this article is to examine and discuss the results of the decisions of the English courts dealing with the facts as they have actually been proved before them in the Russian cases.

II

We need not now consider in any detail the early cases decided before the Soviet Government was recognized by this country: the acts of a revolutionary body cannot be recognized as legal acts, *Aksionairenoye Obschestvo A. M. Luther* v. *James Sagor & Co.*, [1921] 1 K.B. 456, but once a revolutionary body is recognized as the *de facto* or *de iure* government of a country, the acts of that body are retrospectively validated as governmental acts.[1] Consequently, acts of confiscation carried out during a revolution are recognized here once the revolutionary government is recognized; at any rate when those acts do not purport to operate outside the territorial limits of the confiscating state,[2] and *a fortiori* when such acts are directed against local property of subjects of the confiscating state.[3] Further, if by a governmental act in any state a corporation created by the laws of that state is dissolved, or is liquidated with or without the formal and individual dissolution of that corporation, such liquidation or dissolution will be recognized here.[4] There is nothing startling or new about this; but real difficulties of theory occur when once it has been recognized in any given case that a foreign corporation having property here has ceased to exist under the law by which it was incorporated. Indeed, it may well be that an apprehension of these difficulties led the House of Lords to hold, in the case of *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112, the first reported Russian bank case to come before the House after the recognition of the Soviet State by the British Government,[5] that the somewhat equivocal Russian confiscatory legislation did not have the effect of destroying the legal personality of the Russian banking companies formed under the former Czarist régime.

---

[1] Private International Law has never been regarded as outside the scope of the *Year Book*, but the Editorial Committee proposes to devote more space to the subject in future than has been usual in past years.

---

[1] *Aksionairenoye Obschestvo A. M. Luther* v. *James Sagor & Co.*, [1921] 3 K.B. (C.A.) 532, cited by Lord Wright in *Lazard Bros. Ltd.* v. *Midland Bank Ltd.*, [1933] A.C. 289, at p. 297: His Lordship said: "Recognition is retroactive and dates back to the original establishment of Soviet rule which was in the 1917 October revolution. . . ." On the whole subject see also Dr. McNair's article in *B.Y.B. 1921–2*, pp. 56–74; for a statement of the American attitude towards recognition, see Hervey, *Legal Effect of Recognition in International Law*, 1928, University of Pennsylvania Press, and the articles by Professor Edwin D. Dickinson in *Michigan Law Review*, Vol. XXII, pp. 29, 118, and by John S. Tennant, *ibid.*, Vol. XXIX, p. 708, and the authorities there cited.

[2] *The Jupiter* (No. 3), [1927] P. 250, and Sargent L.J. in *Sedgwick Collins & Co.* v. *Rossia Insurance Co.*, [1926] 1 K.B. at p. 15.

[3] *Princess Olga Paley* v. *Weisz*, [1929] 1 K.B. 718.

[4] *Lazard Bros.* v. *Midland Bank Ltd.* (*ubi supra*) per Lord Wright, at p. 302: "No question is here involved of the extraterritorial effect of legislation, confiscatory or other, since the dominant fact is the dissolution of the corporation, which depends on territorial enactments of the country of incorporation, according to which either the existence or non-existence of the corporation is recognized by the law of other countries." See also the statement in Foote, *Private International Law*, 5th ed., at p. 659: "If a company is dissolved by the legislation of that state [wherein it has been incorporated] in accordance with its own law, such company must be regarded everywhere as having become legally extinct. . . ." And see Dicey, *Conflict of Laws*, 5th ed., Rule 139, at p. 544.

[5] This Government was recognized *de facto* sovereign in Russia in 1921, and as *de iure* sovereign in 1924.

The history of the interpretation of the "Soviet Socialist" legislation by English courts is a curious example of the force of non-binding precedent in English law, and of the tendency of our courts to rely upon precedent rather than upon an independent examination of the facts of every case.[1]

A review of the subsequent cases will show how far-reaching was the effect of the *Mulhouse* decision (*ubi supra*) even though it was only given on a question of foreign law, and therefore on a question of fact not technically binding on other courts.[2]

III

In the *Mulhouse* case, the English office of a Russian bank had discharged a debt due to the French bank and then claimed the return of certain securities deposited to cover the debt. After having received payment of the debt, the French bank claimed that the Russian bank was not entitled to the return of the securities, as it had become extinct by the operation of Russian legislation and could not therefore give a good discharge for any securities. The majority of the Court of Appeal (Bankes and Scrutton L.JJ., Atkin L.J. dissenting), following Sankey J. in the court below,[3] had upheld the French bank's interpretation of the Russian legislation. The relevant decrees and orders are set out in [1923] 2 K.B. at pp. 674–81.

As has been indicated, the House of Lords (Lords Cave, Finlay, Atkinson, Sumner, and Wrenbury) reversed the interpretation of the courts below and declared the bank to be still in existence and capable of giving a good receipt for the securities. The decision went on the broad question of the general effect of the Russian legislation, as well as on the narrow ground that the French bank was estopped from denying the authority of the manager of the Russian bank to give a receipt. The feelings of the House regarding the action of the French Bank were indicated by Lord Atkinson, who, at p. 143, characterized the claim of the French bank as 'about as audacious an attempt, at the same time, to approbate and reprobate a given transaction as could be imagined'.

---

[1] It may be observed that this tendency to follow earlier cases on questions of fact was animadverted upon by Lord Wright, who delivered the only opinion given by the House in *Lazard's* case (*ubi supra*); he said (p. 96): "No earlier decision of the court can relieve the judge of the duty of deciding on the actual evidence given in the particular case. On what evidence of foreign law a court can act has been often discussed. The evidence must be that of qualified experts in the foreign law. . . ."

[2] Dicey, *op. cit.*, p. 861, and *Lazard Bros.* v. *Midland Bank Ltd.* (*ubi supra*).

[3] [1923] 2 K.B. (C.A.) 630.

Having adopted this interpretation of the relevant Russian legislation, dictated partly no doubt by the difficulties and substantial injustice that any other interpretation would have produced, it is not strange that the House adhered to the same interpretation in the very next case that came before it, *Banque Internationale de Commerce de Petrograd* v. *Goukassow*.[1]

While the *Mulhouse* case was in the Court of Appeal, Greer J., as he then was, had to construe the Russian legislation affecting insurance companies in the case of *Sea Insurance Co.* v. *Rossia Insurance Co. and Employers' Liability Assurance Corporation*.[2] This legislation consisted of decrees, similar to those construed in the *Mulhouse* case, and, following the reasoning of Bankes L.J. in the *Mulhouse* case, His Lordship held that the insurance company had become extinct by the Russian legislation.

When the matter went before the Court of Appeal (Bankes, Scrutton, and Sargent L.JJ.) the decision of that court in the *Mulhouse* case had been reversed by the House of Lords. Consequently, said Bankes L.J.:[3]

> "The present appeal must proceed on the footing that the Soviet legislation did not wipe out the Rossia Company as a legal entity, but that the effect of the Soviet decrees, and particularly of No. 86, dated December 8, 1918, was to nationalize all insurance business and to direct the liquidation of the Rossia Company from that time."

And Scrutton L.J. said:[4]

> " . . . The Statutes in the Bank cases were stronger against the continued existence of the Bank than the insurance statutes in the present case; and I do not think it would be proper for me to do otherwise than endeavour to apply the decision of the House of Lords."

This interpretation was again followed by the Court of Appeal (Bankes and Sargent L.JJ., Scrutton L.J. dissenting on the question of the validity of service of the writ) in the case of *Sedgwick Collins & Co.* v. *Rossia Insurance Co.* (*Employers Liability Assurance Corporation Garnishees*[5]), and by the House of Lords in *Employers' Liability Corporation* v. *Sedgwick Collins*[6] (Lords Cave, Shaw, Sumner, Parmoor, and Blanesburgh), and by Hill J. in *The Jupiter* (No. 3)[7] with regard to shipping legislation. He said:

> "The decrees for nationalizing shipping companies . . . were at least not stronger than the decrees for nationalizing banking and insurance companies . . . they did not in themselves dissolve the Petrograd company . . ."

---

[1] [1925] A.C. 150.

[2] 17 Ll.L.L.R. 316. And see *post*, p. 13.

[3] 20 Ll.L.L.R., at p. 379.

[4] *Ibid.*, at p. 311.

[5] [1926] 1 K.B. (C.A.) 1.

[6] [1927] A.C. 96.

[7] [1927] P. 122.

In *Sabatier* v. *The Trading Co.*[1] the question of the existence or non-existence of the Russian trading corporation does not seem to have been considered.

In *First Russian Insurance Co.* v. *London & Lancashire Insurance*[2] Romer J. said (p. 933):

> "The defendants do not now contend that the plaintiffs ceased to function on December 1, 1918, by reason of their having ceased to exist. Such a contention could not be maintained since the decision of the House of Lords in *Employers' Liability Assurance Corporation* v. *Sedgwick Collins & Co.*"

His Lordship decided that there was nothing in the Soviet legislation which prevented the plaintiff company from discharging its obligations to the English insurance company by 'a payment in London out of assets of the plaintiffs outside Russia, or by means of a set-off against the defendant's liability to them under outward treaties'.[3]

In an unreported case, *The Manufacturing Company I. A. Wormin Luetchg and Cheshire Ltd. and Cheshire* v. *Frederick Huth & Co.* (K.B.D. May 2, 1928) (Wright J.),[4] Soviet decrees relating to the nationalization of textile industries were considered. It was held, following by analogy the findings in the before-mentioned cases, 'that none of the Soviet decrees had the effect of extinguishing the plaintiff company as a legal entity'.

Thus the interpretation given to Russian legislation by the House of Lords in 1925 was followed until 1932 almost without demur in every decision involving the existence of a Russian corporation.

Two further cases, decided on the effect of Russian confiscatory legislation after the *Mulhouse* case but before 1932, may be noted: *Buerger and another* v. *New York Life Assurance Co.*[5] where the Court of Appeal (Bankes and Atkin L.JJ., Scrutton L.J. dissenting) reversed Greer J. and held on the uncontradicted evidence of a Russian expert that the effect of the Russian legislation relating to insurance companies had not been to prevent the plaintiffs from recovering sums due under policies payable by a Russian branch of a New York company; and *Perry* v. *Equitable Life Assurance Society of U.S.A.*,[6] where Branson J. heard further evidence to contradict the interpretation put on the confiscatory decrees in *Buerger's* case, and decided that the effect of those decrees had in fact been to annul contracts of assurance made with Russian branches of American companies.

---

[1] [1927] 1 Ch. 495.

[2] [1928] 1 Ch. 922.

[3] at p. 949.

[4] Noted in *B.Y.B. 1930*, at p. 235.

[5] (1927), 43 T.L.R. 601.

[6] (1929), 45 T.L.R. 468.

In neither of these cases was the question of the existence or non-existence of a Russian corporation decided.

IV

In 1932 the English courts, for the first time since the House of Lords' decision in the *Mulhouse* case, admitted that pre-revolutionary Russian banks had been dissolved by Soviet legislation. This bold move was made by the Court of Appeal (Scrutton, Greer, and Slesser L.JJ.), reversing the decision of Roche J. in *Lazard Bros. & Co.* v. *Banque Industrielle de Moscou*, *Lazard Bros. & Co.* v. *Midland Bank Ltd.*[1] In these cases the court considered fresh evidence of Soviet law and practice, and documents not considered in the *Mulhouse* case.

Greer L.J. (at p. 649) said:

> "Whatever view may be taken of the position before January 1, 1923, at any rate as and from that date, even if they had a juristic personality up to that date, the banks ceased to have any such juristic personality under the laws of Russia after the Civil Code came into operation."

Greer L.J. (at p. 650) and Slesser L.J. (at p. 663) inclined to the view that the bank had ceased to exist at the date of the issue of the writ against it by Lazard Bros. (October 29, 1930), though Scrutton L.J. (at p. 635) contented himself with saying that the Bank had ceased to exist at the time that the default judgment had been signed against it by Lazard Bros. (November 24, 1930).[2]

This decision was affirmed by the House of Lords.[3] In this case Lord Wright, who delivered a speech in which Viscount Buckmaster and Lords Blanesburgh, Warrington of Clyffe, and Russell of Killowen concurred, was careful to point out that foreign law was a question of fact and did not bind Their Lordships, and further, that in the present case new evidence had come to light. His Lordship noted the conflict of evidence as to the exact moment of the dissolution of the Bank, but found it was not necessary to resolve the question, because "long before 1930 all traces of Czarist banks had vanished", adding later: "I am clearly of the opinion that the dissolution or 'liquidation' came long before October 1930". The Bank being non-existent when the writ was issued, judgment against it was a nullity.[4]

---

[1] [1932] 1 K.B. 617.

[2] For a full account of the case, see p. 186 *infra*.

[3] 49 T.L.R. 94.

[4] This reasoning was recently followed in *Burr and others* v. *Anglo-French Banking Corporation, Ltd.*, 49 T.L.R. 405.

The decision of the Court of Appeal in *Lazard Bros.* case was followed, apparently without further evidence of foreign law, by Eve J. in *Russian and English Bank* v. *Baring Bros. & Co.*,[1] where he held the Russian bank to have been extinguished as a legal entity, and consequently as unable to sue here. Eve J. declined to adopt the suggestion made by Lord Finlay in the *Mulhouse* case (at p. 141), to the effect that an English branch should be allowed "to use the name of the bank for the purpose of getting in its assets". His Lordship made the following suggestion:

> "The acts of those who have intermeddled with the affairs and assets of the branch, after the destruction of the parent company [might] be regularized by adoption and ratification by a liquidator[2] in a winding up order under Section 338 of Part X of the Companies Act 1929. Subsection 2 of that section would appear to fit the circumstances."

This suggestion was considered by Bennett J. in *In re Russian and English Bank*,[3] when he held that subsection 2 of Section 338 of the Companies Act 1929, although added to the law, "because of difficulties which had arisen in dealing in this country with corporations which owed their existence to the law of Russia", was not retrospective in operation and did not apply to the case before him because the company had been dissolved before November 1, 1929, the date when the Companies Act came into operation. His Lordship, however, held that he had jurisdiction to wind up the branch under the old law re-enacted in Section 338 (1) (*d*) (*i*) of the Act, which provided for the winding up of an unregistered company "if the company is dissolved, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs".

This decision was recently followed by Maugham J. in *Re Russian Bank for Foreign Trade*,[4] where he said:

> "After January 1918 (if not before), none of the provisions of the statutes under which the bank was incorporated in 1871 could be complied with, and if the corporation continued to exist as a legal entity, there was no possibility of carrying on its affairs according to the statutes under which it was formed" (p. 68).

His Lordship added:

> "How a branch of the bank in England could continue to function, in those circumstances, it was difficult to understand."

---

[1] [1932] 1 Ch. 434. For a full account, see p. 187 *infra*.

[2] The personal representative may similarly ratify an agent's contracts made after the principal's death. *Foster* v. *Bates*, 12 M. and W. 226.

[3] [1932] 1 Ch. 663. For a full account, see p. 189 *infra*.

[4] 1933 W.N. 67. For a full account see p. 190 *infra*. On the question of service see *In re Tea Trading Co.* 1933 W.N. 79, Case No. 5, p. 191 *infra*.

V

It is submitted that the following is a summary of the rules established or confirmed by the foregoing authorities:

1. A corporation, incorporated under the laws of a foreign state, may be dissolved by the laws of that state.

2. Provided a foreign state has been recognized either *de facto* or *de iure* by the Government of this country, the action of that foreign state incorporating or dissolving a corporation will be recognized by the courts of this country.

3. The dissolution of a foreign corporation will have no direct effect on the assets of such corporation situate in this country, but may have an indirect effect thereon in either of the following ways:

(*a*) by rendering it impossible for the corporation to sue or be sued here;

(*b*) by serving to justify the winding up of an English branch of the corporation as an unregistered company.

VI

Many problems of great theoretical interest and of considerable practical importance arising out of the foregoing decisions still remain to be decided. How must the liquidation of the English assets of a Russian company proceed? And what are the respective rights (if any) in such liquidation of the creditors, the shareholders, and contributories of the corporation and the Crown? In the absence of direct authority, one can only hazard possible solutions.

With regard to the method of liquidating the affairs of the English branch of a foreign company, the writer has already suggested elsewhere[1] that if the analogy of ordinary administration proceedings following on the death of a natural person domiciled abroad leaving property here be firmly adhered to, many of the difficulties with regard to the continued existence of the debts and claims of the English estate will disappear.

The liquidator of the English branch of a foreign corporation dissolved abroad might be considered to be on exactly the same footing as the administrator of the English estate of a person who has died domiciled abroad, and to be able to sue and be sued on exactly the same footing.

---

[1] See *Law Quarterly Review*, Vol. CXCI, pp. 321–2.

The much discussed passage from Lord Finlay's judgment (p. 7) in the *Mulhouse* case, cited by Eve J. in the case of *Russian & English Bank* v. *Baring Bros. & Co.*, would seem to be in point and unobjectionable if for the word "branch" we substitute the word "liquidator". The passage would then read: "In all fairness [the liquidator] must have the right to use the name of the bank for the purpose of getting in its assets". This may well be a fairer way of dealing with the assets and liabilities of a branch here than by allowing the Crown to take all assets as *bona vacantia* without any attempt at winding up, and to acknowledge claims only at its good pleasure. The case of *Re Higginson & Dean*[1] was mentioned by Scrutton L.J. in *Lazard Bros.* case as being in point on the question of *bona vacantia* when applied to the assets of a company. This case was recently referred to in *Re Wells, Swinburne-Hanham* v. *Howard*,[2] but in both those cases the companies had been dissolved after a proper winding up in which the claims of creditors had been dealt with; these cases are then distinguishable from the cases of the winding up of Russian branches where the creditors of the branches have never had any chance of proving their debts, and where no attempt has been made to set off debts against assets, as justice demands.

Re Wells is an authority for the statement that Section 296 of the Companies Act, 1929, which provides that property of a dissolved company shall be *bona vacantia*, is new and not retrospective in operation. The Court of Appeal (Lords Hanworth, Romer, and Lawrence) accepted on this point the view of Farwell J., who said in the court below:[3]

> "That section is not, in my judgment, retrospective, it provides what is to happen to such property as from the passing of the Act, but, in my judgment, it does not operate so as to give the Crown any right in property which it had not got prior to the passing of that Act."

Probably most of the Russian banks and other corporations were dissolved before the operation of the Companies Act, and the liquidation of their English branches will not be affected by Section 296, but in any case it may be doubted whether or not Section 296, following as it does on sections relating to companies registered in the Companies Register and struck off therefrom as dissolved, may be said to apply to the property of an unregistered foreign company, at any rate where the property of such a company has not first been collected and administered on behalf of its creditors. Further, the definition of "company" and "existing company" contained in Section 380 of the Companies Act, expressly states that "unless the context otherwise requires", the expression "company" refers to a company incorporated under the various English Companies Acts: there is nothing in the context of Section 296 to require a wider interpretation of the word "company" in that section, and the position of foreign companies should, it is submitted, be governed by the principles of the Common Law.

---

[1] [1899] 1 Q.B. 325.

[2] [1933] 1 Ch. 29.

[3] [1932] 1 Ch. at p. 389, see also Lawrence L. J. [1933] (C.A.) 1 Ch. at p. 48; for a criticism of this decision so far as it relates to freehold land, see "Reverter to the donor of the legal fee vested in a dissolved corporation" by F. E. Farrer, *L.Q.R.*, XLIX, p. 240.

If this contention is wrong and Section 296 does apply to unregistered foreign companies dissolved after the coming into operation of the Act, then there will be the possibility of applying Section 294, which provides for declaring a dissolution void within two years thereof. Such a declaration may be obtained by any person having an unsatisfied claim against the dissolved company, although "where the application is made on the ground that there are undistributed assets . . . the Attorney-General should be served on behalf of the Crown, since the assets may be *bona vacantia*".[1] But even if this procedure were applicable, it would not be very satisfactory in the Russian Bank cases, because in many cases the date of dissolution would have occurred more than two years before any application was possible, and in any case, even if a dissolution could be declared void under Section 294, such avoidance would apparently not validate acts and proceedings done *bona fide* in ignorance of the dissolution, between the date of the actual dissolution and the date of the avoidance thereof.[2]

The application of Sections 294 and 296 is not then considered proper or desirable by the writer, and the winding up of branches of Russian banks would probably be correctly dealt with, and best accomplished, apart from these sections. It is upon these lines that the following discussion will proceed.

The suggestion made by Wright J. in *Higginson's* case, to the effect that the Crown could only maintain actions where it could allege a trust (at p. 332), was disapproved of in *Re Wells*, where the view was taken that the King was owner of everything which had no other owner. This view would seem to be more in accordance with the views of Story, set out at p. 332 of *Higginson's* case, than with the view of Blackstone, who followed the civil law, cited at p. 330 of that case, to the effect that "the debts of a corporation either to or from it, are totally extinguished by its dissolution".

---

[1] See Buckley on *The Companies Act*, 11th ed., p. 593, and the authorities there cited.

[2] See Buckley, *op. cit.*, p. 593, and *Morriss* v. *Harris*, [1927] A.C. 252.

Now if a debt owing to or an equity of redemption owned by a dissolved corporation remains enforceable by the Crown, it must be in existence. Debts owed to or by a deceased natural person remain in existence, vesting either in his personal representative, where there is a will, or, in the case of an intestacy, in the "Probate Judge, in the same manner and to the same extent as formerly in the case of personal estate it vested in the Ordinary".[1]

In the case of a dissolved corporation there should be no objection to deeming the right to its assets in this country to be vested, pending liquidation, in the board of directors or managers appointed to conduct the English affairs of the company on trust for the persons entitled to them, in the same way as the property of a deceased person vests in his executors on his death. Failing this, the property of the English branch could be deemed to be vested in the Crown, subject to the necessity for collecting and paying any debts after dissolution of the parent body. As Lord Hanworth pointed out in *Re Wells* (p. 44):

> "Upon the intestacy of a bastard or of a legitimate person without next of kin, the King takes as *ultimus heres*, but subject to the debts of the intestate...."

In other words, on the death of a natural person the Crown never takes his estate as *bona vacantia* until the estate has been fully administered and the just claims of creditors have been met. It is suggested that the same principle of justice to creditors should apply where a foreign corporation has been dissolved before its assets here have been administered on behalf of its creditors, and that theoretical difficulties with regard to the vesting of its assets pending the appointment of a liquidator should not be allowed to stand in the way of substantial justice to creditors and others. And whether the property of a dissolved corporation were deemed to be vested in the directors of the English branch or in the Crown, any doubts or difficulties could be set at rest on the appointment of a liquidator by the court vesting the legal estate or interest in any property situate here in the liquidator by means of a vesting order. The order could be made under Section 190 of the Companies Act, 1929, without prejudice to the rights of the Crown or the persons entitled to the residue of property here after collection of assets and payment of debts. This section presumably applies to all liquidations commenced after the date of the Act, and probably also to liquidations continued after the coming into force of the Act. This is an enabling section and may well be deemed to apply in the liquidation of unregistered companies. "Indeed", says Buckley,[1] "under the Act of 1908 such a vesting order could be made only in the case of an unregistered company being wound up by the court."

---

[1] Section 9 of the Administration of Estates Act, 1925; *vide* Wolstenholme and Cherry's *Conveyancing Statutes*, 12th ed., Vol. II, p. 1423.

VII

No difficulties, apart from questions of the Statutes of Limitations, ought to occur, therefore, in respect of the collection of debts and the payment of liabilities of an English branch of a foreign corporation. Debts incurred and contracts made by an English branch, after the technical dissolution of a foreign corporation, may be ratified even though they were contracted in the name and on behalf of a corporation which had ceased to exist. Perhaps their ratification might be compelled by a bold use of the principle of estoppel.

It was stated by Luxmoore J. in *De Tchihatchef* v. *Salerni Coupling Ltd.*[2] that:

> "If a person authorizes or permits another to make a representation for the purposes of it being acted upon, and it is acted upon, that person cannot afterwards be heard to say that the representation is not true. This applies even if the representation is as to the legal effect of the document, if there is no qualification in the representation suggesting that the document and not its effect as represented is to govern the relationship of the parties."

It is suggested therefore that where persons have undertaken a liability to the directors or managers of an English branch of a Russian corporation, believing, on a mistaken interpretation of the effect of Russian legislation, in the existence of the corporation after the actual legal dissolution of it by Russian law, they may not plead, in defence to any action on behalf of the corporation, that the corporation did not exist when the contract was made. Ratification is an effective answer to such a plea.

Conversely, it is suggested that the liquidator of an English branch should be bound, at any rate to the extent of the assets coming into his hands, in respect of acts properly done by directors acting as agents of necessity on the basis of the continued existence of the bank. It would be just as inequitable for him to repudiate a contract as for the persons who contracted with the directors to do so. All such parties should be estopped from denying the continued existence of the corporation in cases where the dissolution was unknown to them.[1] After all, a question of the interpretation of foreign law is, as has been repeatedly pointed out, a question of fact, and a decision on what has been admitted to be a mere technical point of theoretical existence should make no difference to the practical solution of pressing problems of administration here. In this connexion one may recall the words of Greer J., in *Sea Insurance Co.* v. *Rossia Insurance Co. and Employers' Liability Assurance Corporation*:[2]

---

[1] *Op. cit.*, p. 416.

[2] [1932] 1 Ch. 330.

> "It may be true to say that for the purposes of litigation in this country the Rossia Insurance Company no longer exists, it is not necessarily true to say that that is the law all the world over. . . . It may very well be that, even apart from the laws of foreign countries, for some purposes the creditors of the Rossia Insurance Company may be entitled to say it still exists, because those who are alleging that they were carrying on its business, who are alleging that they have its property, are estopped from saying that the business they have been carrying on is not the business of the Rossia Insurance Company. . . . It may be that in some proceedings a case of estoppel may be made out. . . ."

This use of the principle of estoppel would, it is thought, apply to debts payable to or by the English branch of a foreign corporation, at any rate where the payment was to be made or received here under the contract: in such cases English law would be the *lex loci solutionis* and would recognize the effectiveness of such payments to discharge the debts.[3]

VIII

English law, the *lex fori*, would, of course, govern the order of payment of debts in an English liquidation, by analogy with bankruptcy proceedings and the procedure on the administration of estates.[4] Winding up, as distinct from bankruptcy and administration, is purely territorial in operation,[5] and no attempt must be made to collect the assets of a foreign corporation situate abroad; and, of course, as a result of confiscatory legislation, assets of a corporation previously existing, say in Russia, may have

[1] See dictum in *Drew* v. *Nunn* 4 Q.B.D. 661 at p. 668; the position is however by no means free from difficulty, but it is suggested that *Salton* v. *New Beeston Cycle Co.* [1900] 1 Ch. 43, *cit. Bowstead on Agency*, 8th. ed., p. 464, should be limited to cases relating to authority to continue litigation.

[2] 17 Ll. L.L.R. 316, at p. 318.

[3] *Employers' Liability Corporation* v. *Sedgwick Collins & Co.* (*ubi supra*).

[4] Cf. Dicey, *op. cit.*, pp. 787 and 791, and the authorities there cited.

[5] Cf. Dicey, *op. cit.*, p. 376.

become vested in the State or in some person who has obtained a good title by the *lex situs*.[1]

In the recent case of *Re Vocalion (Foreign) Ltd.*,[2] Maugham J. made some interesting remarks on the subject of concurrent winding up orders. He said:

> "There may be winding up orders made in the foreign country where the company has carried on business and possessed assets. The view of this court is that the principal winding up should be in the principal domicil of the corporation, and that any other winding up order should be ancillary to the principal winding up."

Subject to the limited scope of a winding up here, this case shows a distinct tendency to follow the practice which has been settled in connexion with the winding up of the English estate of a person domiciled abroad,[3] where the surplus English assets, after payment of all English and foreign debts of which the English executors have notice, are ordered to be handed over to the foreign heirs charged with the administration and distribution of the estate by the courts of the deceased's domicil; this is the normal procedure. But in *Re Lorillard*[4] the English administrator was allowed to administer the English estate and distribute the surplus assets according to the law of succession of the testator's domicil, because if the assets had been handed over to the administrator of the domicil, claims, statute barred by English law but enforceable by the law of the domicil, would have been enforced.

It was also decided in *Re Barnett's Trusts*[5] that where there was a surplus after administration of the English estate of a bastard who died intestate domiciled in Austria, the claim of the Austrian fisc was not in the nature of a succession under the law of the domicil, and that the Crown could claim unclaimed assets as *bona vacantia* instead of the fisc of the domicil. Presumably, the same reasoning would apply in the case of the winding up of the English assets of a corporation domiciled in Russia. The normal principle would be to hand over the surplus to the persons entitled to them by the law of the domicil of the corporation, but if it were proved that by the foreign law only the foreign fisc would benefit, and *a fortiori* if the foreign fisc would benefit by virtue of confiscatory legislation, then the English court would not hand over the surplus to the persons entitled under the law of the foreign corporation's domicil. Quite apart from the reasoning in *Re Barnett*, to hand over the surplus say to the Russian fisc would be an indirect way of recognizing the effect of a foreign penal law over assets here, contrary to *Le Couturier* v. *Rey*,[1] and *The Jupiter* (No. 3).[2]

---

[1] *Princess Olga Paley* v. *Weisz* (*ubi supra*).

[2] [1932] 2 Ch. 196.

[3] See for example *Re Achillopoulos*, [1928] Ch. 433.

[4] [1922] 2 Ch. (C.A.) 638.

[5] [1902] 1 Ch. 847.

Maugham J. said in *Re Russian Bank for Foreign Trade*:[3]

> "If a winding up order was made [in that case] the Russian Government might think fit to make a claim to the residue of the assets. On the other hand the Crown might have a claim to them as *bona vacantia.*"

It is submitted that it is unlikely that any residue would be handed over for confiscation by a foreign government.

IX

With regard to the debts provable against the English assets in a winding up here, the following points may be noted. Normally, as Maugham J. said in *Re Vocalion*: "In a winding up here all creditors, whether British or foreign, who can prove their debts have equal rights." This is the rule in bankruptcy and administration proceedings in this country. But in connexion with Russian legislation the case of *Perry* v. *Equitable Life Assurance Company* (*ubi supra*) should be borne in mind, and it may be that debts due from the parent body, payable in Russia, may have been annulled by being discharged by Russian legislation; in such a case presumably such debts could not be proved here. As Maugham J. said in *Re Russian Bank for Foreign Trade* (*ubi supra*), the only claim in such a case may be against the Soviet State. In any case, all proofs here would be subject to the rules designed to prevent double proof, here and abroad, laid down in *Banco de Portugal* v. *Waddell.*[4] Russian legislation annulling debts due from the corporation elsewhere than in Russia would presumably be inoperative here, being outside the competence of the Russian legislature as previously pointed out. To quote once more from *Re Russian Bank for Foreign Trade* (at p. 68): if a debt

> "was primarily recoverable in London . . . it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalization decrees."

X

An even more difficult question remains: what is the position of shareholders and contributories in the winding up of the English assets of a Russian bank after creditors have been paid?

---

[1] [1910] A.C. 262.

[2] [1927] P. (C.A.) 250.

[3] 1933 W.N., at p. 68.

[4] [1880] 5 App. Cas. 161.

In the normal case the surplus assets will be handed over to the liquidator of the company's domicil, who will distribute the ultimate residue among those entitled by the local law and the company's statutes or memorandum and articles of association. But where the company has been dissolved abroad and its assets confiscated, then, as has been pointed out,[1] assets left after payment of creditors in an English winding up will not be handed over to the foreign state. There are at least three ways in which these assets may be dealt with. First, it may be proved by evidence of experts that the claims of shareholders to a return of capital, or to any share in surplus assets on the winding up of a Russian company, being claims due under the constitution of the company, that is under a Russian contract with a Russian corporation, must be regarded as having been annulled by Russian legislation, as in *Perry's* case (*ubi supra*), and therefore all assets here after the English creditors had been paid would go as *bona vacantia* to the Crown. Secondly, it is possible that the English courts would refuse to give any effect at all to Russian confiscatory legislation, because to do so would be to take away the right of shareholders to assets here, and on this basis permit shareholders to claim in the liquidation as postponed creditors in respect of any assets remaining after payment of creditors. Thirdly, evidence might be given to show that where by Russian law a company's share capital had vested in the Russian Government, the effect of that law was not to destroy the underlying *nexus* of partnership in every company. Dealing with rights of shareholders to share in surplus assets after repayment of capital in an ordinary case of winding up, Lord Hanworth said recently:[2]

> "We start, therefore, the consideration of this question with two principles in our minds, that the corporators have entered into a contract by which they become partners in the venture, and that when there are surplus assets left over they are to be dealt with as between members on the basis of equality, whatever were the original and limited rights of the preference shareholders earlier."

If, therefore, in the unlikely event of there being a surplus in an English winding up after allowing for the amount of the share capital, which would either be repaid to the shareholders or taken by the Crown as *bona vacantia* in accordance with one of the above suggestions, then it is just possible that any such surplus would be returnable to the original shareholders. The Crown would, of course, take as *bona vacantia* the claims to surplus assets of such shareholders as could not be found and left no lawful successors.[1]

---

[1] *Ante*, Section VIII.

[2] *In re Metcalfe*, [1933] 1 Ch. at p. 155; *vide* also Lord Wrenbury in the *Mulhouse* case, at p. 149.

These three are perhaps not the only possibilities, and in any case the exact position of the shareholders would have to be proved by evidence of the original constitution of the corporation and of Russian law.

If the view is taken that Russian legislation does not affect the contracts between the company and its shareholders, then presumably there would be some ground for treating contributories resident here as liable for any unpaid calls due under the company's constitution, where such calls were recoverable here. Once more the principle of estoppel may be important.

The position is very difficult indeed, but not incapable of solution. It is earnestly to be hoped that the doctrine of the corporate personality of a company, so much abused in modern company law, will not be taken as a basis of providing the somewhat unjust short cut suggested by Blackstone, who, as has been pointed out, considered that a dissolved corporation could not owe or be owed any debt. This would be an unduly narrow attitude and would not provide a means of meeting the just claims of creditors. A legal theory of corporate personality is only a means to an end, not an end in itself. It should not stand in the way of substantial justice.

---

[1] If the view is taken that there remains a fundamental nexus of partnership among shareholders of a dissolved Russian corporation, then it is just possible that this will provide a means of administering English assets of such a corporation even when it has never traded in England, as for example the Banque Industrielle de Moscou. Actions to claim such assets might be brought by shareholders resident here as partners, on behalf of their co-partners: all the shareholders would have a common interest in such actions: *vide* Lindley on *Partnership*, 9th ed., p. 567. If the claims succeeded it is conceivable that the shareholders here might then claim a dissolution of partnership by the court under s. 25 of the Partnership Act, 1890, and the division of any surplus under s. 39 of that Act. There is the authority of Lindley (*op. cit.*, p. 566) for saying that a decree of dissolution might be made when "each class [of partner] is represented by one or two of the individuals composing it". The fact that there were more than the number permitted in an English partnership would not make a foreign partnership illegal, *vide* Lord Wrenbury at p. 149 of the *Mulhouse* case.

THE RULE OF UNANIMITY: THE PRACTICE OF THE COUNCIL AND ASSEMBLY OF THE LEAGUE OF NATIONS.[1]

By JULIUS STONE, B.A., B.C.L. (Oxon.), LL.M. (University of Leeds), S.J.D. (Harvard), Instructor in Jurisprudence, Harvard Law School.

THE classical statement as to the significance of the rule of unanimity in its application to the working of the organs of the League of Nations is to be found in an opinion of the Permanent Court of International Justice.[2] Speaking of the Council, the Court declared:

> "In a body constituted in this way, whose mission is to deal with any matter 'within the sphere of action of the League or affecting the peace of the world', observance of the rule of unanimity is naturally and even necessarily indicated. Only if the decisions of the Council have the support of the unanimous consent of the Powers composing it, will they possess the degree of authority which they must have; the very prestige of the League might be imperilled if it were admitted, in the absence of an express provision to that effect, that decisions on important questions could be taken by a majority. Moreover, it is hardly conceivable that resolutions on questions affecting the peace of the world could be adopted against the will of those amongst the members of the Council, who, although in a minority, would, by reason of their political position, have to bear the larger share of the responsibilities and consequences ensuing therefrom."

This *dictum*, on analysis, resolves itself into the following three propositions:

(*a*) A majority decision lacks authority.

(*b*) Such a decision is therefore unenforceable in the face of the opposition of any of the Great Powers, or of the interested states.

(*c*) Hence the practice of taking such decisions would tend to undermine the prestige of the League of Nations.

At the present time no doubt can be felt as to the validity of the propositions. On the other hand, however, it should be remembered that the rule is but a means to an end. There is no magic in it. A change of the existing political situation is essential if progress is to be made in international organization, and if, and so far as, that change comes about, the scope of the rule of unanimity will adjust itself to the new situation.

---

[1] This paper is not intended to be more than an analysis of the practice of the Council and Assembly. For a critical account of the practice until 1925 see Sir John Fischer Williams, "The League of Nations and Unanimity", in *American Journal of International Law*, Vol. XIX, p. 475; reprinted in *Chapters on Current International Law*, p. 420.

[2] *Publications of the Permanent Court of International Justice*, Series B, No. 12, p. 29.

To one who considers the Covenant as a whole, particularly its provisions as to the settlement of disputes, the rule of unanimity, despite the foregoing considerations, presents a paradox. It seems to be laid down, on the one hand, that a state shall not be a judge in its own case; on the other, it is laid down that whenever the interests of a state are specially affected it shall be entitled to resist any action by making unanimity impossible.[1] It is true that even in the Permanent Court of International Justice states parties, and intervening states, are entitled to have judges of their own nationality on the bench during the hearing of their case, but there the rule of unanimity does not operate and a majority decision is possible. This vital distinction proceeds from the more advanced stage of development which has been attained in the judicial settlement of international disputes.

However remarkable the paradox which the rule of unanimity presents, it is one which cannot be escaped, and an essential preliminary to an examination of the rule of unanimity is a consideration of the composition of the Council when it sits to take decisions.

I. The Composition of the Council

A. *The right to be represented under Article 4, paragraph 5, of a state whose interests are specially affected by a matter before the Council.*

Article 4, paragraph 5, of the Covenant provides that:

> "Any Member of the League not represented on the Council shall be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League."

It should first be noted with regard to this paragraph that there is a divergence between the English and the French texts. The English text says precisely that the representative is to sit "as a member"; the French text merely that the state concerned "*est invité à y envoyer siéger un représentant*". No difficulty has arisen in practice from this divergence.[1]

---

[1] For an exposition and attempted solution of this paradox see *ibid.*, pp. 28–31. For a recent illustration see the Council discussions under Art. 11, during the Sino-Japanese dispute, of the draft resolution of October 24, 1931 (*League of Nations Official Journal*, 1931, p. 2341). The resolution was lost in spite of a favourable vote by all members of the Council, except Japan which voted against the resolution. The resolutions of the Council of September 30, 1931, December 10, 1931, and September 24, 1932, were unanimously adopted (*O.J.*, 1931, pp. 2308, 2378; 1932, p. 1735). The Assembly, acting under Art. 15, adopted the report of February 24, 1933, so grave in its significance, in spite of the contrary vote of Japan (Document A, (Extra), 22, 1933, VII). A comparison of the respective consequences of the non-adoption of the resolution of October 24, 1931, and the adoption of the report of February 24, 1933, will be a most illuminating test of the merits of the rule of unanimity.

It is clear from the text and it has been noted in the Council[2] that this paragraph confers a *right* to representation upon the state concerned, but does not impose a *duty* to be represented. It is incumbent upon the Council to issue the invitation to the interested state, but it is not incumbent upon the interested state to be represented. In practice this observation is of small importance, since in general the interested state desires to be represented, and gladly avails itself of the opportunity.[3]

(1) *The rights of a state represented under paragraph 5.*

As to the rights of a state sitting under paragraph 5, it is usually stated in an unqualified form that such a state is entitled to all the rights of expression and voting of ordinary permanent or non-permanent members of the Council. It would thus be entitled, *inter alia*, to receive all the Council documents, to take part in the discussions, to vote, and to have its vote counted on an equal footing with that of other members.

In this form the statement requires at least two qualifications. In the first place, it is clear that if there is any provision to the contrary in the Covenant, or in the treaty giving competence to the Council, restricting the rights of voting or the counting of the votes of the interested states, effect will be given to that restriction. Obvious examples of contrary provisions of the Covenant would be Article 5, paragraph 2, Article 15, paragraphs 4 and 6, and Article 16, paragraph 4. This fact in itself would necessitate no qualification since these articles apply equally to states present by virtue of paragraph 5 and all other members. The Council, however, has gone beyond this, and has held that where, in respect of the subject-matter before it, competence is conferred by a special treaty, then, if the proceeding partakes of the nature of an arbitration, it will not count the votes of the interested parties in deciding whether unanimity exists.

---

[1] The commentators pay no attention to the divergence. Schücking and Wehberg, *Die Satzung des Völkerbundes*, p. 205; Ray, *Commentaire du Pacte*, p. 214. But see G. Popovitch, *La Composition du Conseil de la Société des Nations*, Lausanne, 1929, p. 137.

[2] *O. J.*, 1929, p. 514.

[3] In one branch of the Council's activity, thoroughly explored by the writer, namely, the protection of minorities, there has been no case where such an invitation has been declined. But see *post*, p. 22, n. 7.

Thus in the question concerning the frontier between Turkey and Iraq the Council was given competence by Article 3 of the Treaty of Lausanne which provides as follows:

> "The frontier between Turkey and Iraq shall be laid down in a friendly arrangement to be concluded between Turkey and Great Britain within nine months.
>
> "In the event of no agreement being reached between the two Governments within the time mentioned the dispute shall be referred to the Council of the League of Nations."

When the matter was submitted to the Council under the second paragraph, Turkey, which was not a Member of the League, was invited by the Council "to be represented on a footing of equality at its discussions on this question".[1] There appears to have been no express acceptance of this invitation by the Turkish Government, but that Government informed the Council on September 5, 1924, that His Excellency Fethi Bey had been accredited to represent his Government in the examination of this question. Fethi Bey took his seat in the Council on September 20, 1924.[2]

The Council decided to ask the Permanent Court of International Justice for an advisory opinion on the following questions:

1. Would its decision be in the nature of an arbitral award, a recommendation, or a simple mediation?
2. Must its decision be taken by a unanimous vote or might it be taken by a majority?
3. Were the representatives of the interested parties entitled to take part in the vote?

As to the first question the Court advised[3] that "the decision . . . will be binding on the parties and will constitute a definitive determination of the frontier between Turkey and Iraq". As to the second, after referring to the rule of unanimity and noting that the rule applied in this case, the Court proceeded to hold that there was here in effect a proceeding analogous to that under Article 15 of the Covenant.[4] Therefore the votes of the interested parties should not be computed in deciding whether there was unanimity. The opinion states:

> "From a practical standpoint, to require that the representatives of the parties

---

[1] See Telegram to Turkish Government, *O. J.*, 1924, pp. 1292–3.

[2] *O. J.*, 1924, p. 1318.

[3] *Publications of the Permanent Court of International Justice*, Series B, No. 12, p. 33.

[4] *Ibid.*, pp. 28–31.

> should accept the Council's decision would be tantamount to giving them a right of veto enabling them to prevent any decision being reached; this would hardly be in conformity with the intention manifested in Article 3, paragraph 2, of the Treaty of Lausanne. . . .
>
> "The representatives will take part in the vote, for they form part of the Council and, like the other representatives, they are entitled, and are in duty bound,[1] to take part in the deliberations of that body. The terms of paragraphs 6 and 7 of Article 15 of the Covenant and of the new clause to be inserted in Article 16 clearly show that in the cases therein contemplated the representatives of the parties may take part in the voting, and that it is only for the purpose of determining whether unanimous agreement has been reached that their votes are not counted."[2]

At its meeting of December 8, 1925,[3] the Council adopted the opinion despite the protests of the Turkish representative and his vote cast against the proposal. After stating that the adoption of the opinion was a matter of procedure within paragraph 2 of Article 5 of the Covenant, the President (M. Scialoja) said that he thought

> "that in the present case the Council might adopt the stricter rule; in accordance with the principle contained in Article 15 of the Covenant, which contemplated a unanimous vote, but in reckoning unanimity the votes of the interested states would not be counted".

The President put the question to the vote, each member voting individually, and the minutes conclude with the following remarkable statement:

> "The report of M. Unden in favour of accepting the advisory opinion of the Permanent Court of International Justice at The Hague was unanimously adopted, the representative of Turkey voting against the report."[4]

This seems to be the only case of the adoption of an advisory opinion without real unanimity, a fact made the more striking if it is remembered that Turkey had opposed the request to the Court.[5] The Turkish representative, on the adoption of the opinion, declared that in the circumstances the powers of his delegation to act were terminated,[6] and Turkey was not represented at the final discussion of this question on December 16, 1925,[7] when a resolution delimiting the frontier was adopted by unanimous vote excluding the vote of Great Britain.

It is clear that by drawing an analogy between the submission of this question and the submission of a dispute under Article 15 of the Covenant, the Council and the Court placed a serious qualification upon the general doctrine that a state present by virtue of Article 4, paragraph 5, is entitled to have full weight and effect given to its vote. This process of subsuming to articles of the Covenant provisions of unrelated conventional instruments has both advantages and disadvantages. These it is impossible to examine here, but it may perhaps be suggested that the same reasoning as that followed in this case would be equally applicable to whole classes of cases where it has not in fact been applied.[1]

---

[1] This can scarcely mean "legally bound".

[2] *Publications of the Permanent Court of International Justice*, Series B, No. 12, p. 32.

[3] *O. J.*, 1926, pp. 120 *et seq.*

[4] *Ibid.*, p. 128.

[5] *O. J.*, 1925, pp. 1379–82. It is arguable, however, that in spite of the form of the invitation to Turkey, the Turkish vote was not required for a unanimous decision since Turkey was not a Member of the League (Art. 5, para. 1).

[6] *O. J.*, 1926, p. 128.

[7] *O. J.*, 1926, p. 92. This is one of the very few occasions where a state has not availed itself of the invitation to sit on the Council under Art. 4, par. 5.

Another case of the apparent restriction of voting rights of a similar kind may be seen in the frontier controversy between Austria and Hungary which was decided by the Council in 1922.[2] The dissent of Austria was not so emphatic, however, as was that of Turkey in the later case.

The second qualification, which must perhaps be undergone by the general proposition that a state represented under Article 4, paragraph 5, has full voting rights while it sits, is that where state X is sitting by virtue of that paragraph, and the question arises whether state Y shall also be invited to sit at the discussion, state X will not be entitled to vote on that proposition. This is a qualification dictated by common sense and does not seem to have aroused controversy.[3] The question arose in a very unusual form when the Council, on October 15, 1931, decided to invite the United States to sit at the Council table during the discussions of the Sino-Japanese dispute. Japan voted against the proposal, but was, of course, present as a member of the Council, and not under Article 4, paragraph 5.[4] The resolution was regarded as a matter of procedure for which only a majority vote was required, and a representative of the United States took his seat at the Council table on October 16, 1931.[5] He did not sit *as a member* under Article 4, paragraph 5,[6] but merely by virtue of the *ad hoc* invitation.

(2) *When do matters specially affect the interests of a state?*

The determination of the circumstances in which a state will be entitled to sit under paragraph 5 is more difficult.

---

[1] In the Sino-Japanese dispute the tendency was rather to extend the call for unanimity. The Council made great efforts to achieve it, even in matters of procedure (*O. J.*, 1932, p. 1735). The Japanese representative insisted that even action under Art. 15 required unanimity including the votes of the parties (*Ibid.*, pp. 1912–15). See also *ibid.*, pp. 371–2.

[2] See *O. J.*, 1922, pp. 1196, 1332–3, and 1338.

[3] See Schücking and Wehberg, *op. cit.*, p. 217.

[4] *O. J.*, 1931, p. 2329.

[5] *O. J.*, 1931, pp. 2335–8.

[6] *O. J.*, 1931, p. 2323.

When does a matter specially affect the interests of a state? Two inquiries are here involved. First, what are interests? Second, when are they specially affected?

The decision as to the application of paragraph 5 in each case lies with the Council itself; hence only an examination of the practice of the Council can give a useful understanding of the true scope of the paragraph. This practice has not always been logically consistent, and has often been determined by very practical considerations. Moreover, here, as in so many other controverted questions, the Council has been careful not to burden itself with rigid interpretations which might hamper its movement in future circumstances.[1]

What are "interests"?

Interests may be merely factual. For instance, the indebtedness of state X to state Y constitutes an interest in state Y when the financial affairs of state X are being considered by the Council. Thus, during the discussions concerning the loan to Austria in 1922, Czechoslovakia was held entitled to be present because she "had during the last year made large advances to Austria guaranteed by specific assets".[2] On the other hand, interests will, in general, be of a legal nature, as for instance the fact that a state is party to a treaty the application or interpretation of which is in issue. This seems to correspond more or less exactly to the "interest" of a state which is entitled to intervene in proceedings before the Permanent Court of International Justice under Article 62 of the Statute of the Court. Article 62 provides for intervention by a state having an interest of a legal nature in the subject litigated and "the Court should only admit such intervention if, in its opinion, the existence of this interest is sufficiently demonstrated".[3] This right of intervention, therefore, depends upon an *ad hoc* decision of the Court. In contrast with this, intervention by a state under Article 63 where "the construction of a convention" to which it is a party is in question is an absolute right. Moreover, when any such question is before the Court the Registrar must notify every party to the Convention so as to give it an opportunity to intervene.

As to an intervention under Article 62, it seems unsettled whether the decision of the Court will be binding upon the intervening state: whereas under Article 63 it is expressly provided that "the construction given by the judgment will be equally binding upon it".[1]

---

[1] Compare the report of the Committee of Jurists of September 19, 1924, *O. J.*, 1924, p. 1315.

[2] *O. J.*, 1922, p. 1445. For other examples of financial interests see *ibid.*, 1932, pp. 1029–30; 1932, p. 1249.

[3] *Publications of the Permanent Court of International Justice*, Series A, No. 1, p. 12.

The similarities between intervention before the Court and representation on the Council are obvious. Both are intended at the same time to safeguard the interests of the state concerned, and to give greater assurance of the efficacy of the decision taken. In both cases the state concerned has a right to be heard; in neither case is there a duty to express itself. The differences, however, are no less important. There are two outstanding ones. In the first place, a state intervening before the Court though entitled, in so far as it becomes a party, to have a judge of its nationality on the bench under Article 31 of the Statute, in no sense exercises a right of veto on the decision. In Council proceedings, however, the contrary is generally true. In the second place, the right to intervene under Articles 62 and 63 of the Statute is from one point of view granted to a wider class of states than is the right of representation under Article 4, paragraph 5, of the Covenant. The degree or uniqueness of interest is immaterial in the former case; in the latter it is of decisive importance. From another point of view, not important in actual fact, Articles 62 and 63 are narrower, since they cover only interests of a legal nature, whereas Article 4, paragraph 5, speaks simply of interests.

When are interests "specially affected"?

The apparent meaning of the term "specially affecting the interests" of a state is that the interests of that state are affected more than those of other states; but when one has said this one has said very little. The problem is merely removed to the questions—How many other states must there be whose interests are not affected? Can a large number, or even the majority, of states members of the League be specially interested in a particular matter? Does a special interest cease to be special because it is shared by a number of states?

These are questions to which the Council has not attempted to formulate an answer from a theoretical point of view. Its decisions have been empirically conditioned throughout. Three practical motives have operated to exclude representation under paragraph 5 when the interests of a considerable number of states are involved.[1] In the first place, the Council has feared that interminable discussions might be produced by the presence of a considerable number of interested states. In the second place, it has tried to avoid increasing the size of the Council to a degree which would make it unwieldy. In the third place, the joint effect of the presence of a large number of interested states and the rule of unanimity would almost certainly be to prevent any decision being taken. The most liberal view taken by the Council was perhaps in the discussions concerning the loan for Bulgarian refugees in 1926, when there were present by virtue of Article 4, paragraph 5, Bulgaria, Greece, Yugoslavia, and Roumania.[2]

---

[1] For examples of the use of Arts. 62 and 63 see *ibid.*, Series C, No. 3. Vol. I, pp. 104, 116–18. It is of interest to note here that in deciding whether a state may appoint a judge *ad hoc* in advisory proceedings under Art. 71, par. 2, of the Rules of Court (Series D, No. 1, 2nd ed., p. 47), the Court takes as a test whether that state was represented on the Council under Art. 4 of the Covenant during the discussions leading up to the request for an advisory opinion. See Series E, No. 7, p. 303.

The action of the Council in the last twelve years has followed one of two lines, with considerable wavering between the two, so far as the claims to representation of a number of states are concerned.

First, it has sometimes refused to allow representation under paragraph 5, and has merely informed the states concerned that they may, if they so desire, submit observations to the Council, either in writing or verbally, usually the former. An example of this may be seen in the question concerning the claim of India to be represented on the Governing Body of the International Labour Organization.[3] In accordance with the Council's intimation, the representatives of India,[4] Switzerland,[5] and Poland[6] presented their views verbally to the Council. They were not represented at the subsequent discussions, nor at the decision of the questions.[7]

The second line followed by the Council, and the one which seems to be established at the present time, is of a more logical character. Where there is an international régime affecting a number of states, for example the system of protection of minorities, or the organization of the power of the Council to make investigations in the former ex-enemy states,[8] a distinction has been made.

This distinction was first suggested in the Council's discussions on the latter subject in 1924 and received the general approval of the members of the Council. It lay between the general organization of a system of investigation, on the one hand, when the Council should act without enlarging its normal composition, no state being specially interested; and, on the other hand, the application of the system to a particular state, when that state would be specially interested and should be represented. The Council had already asked a committee of jurists to advise whether the states concerned should be invited to discussions concerning the mode of exercising the power of investigation and the limits of the power, and the jurists had replied that in neither case was there a right to representation.[1] They added cautiously, however, that they did not profess to be giving a general opinion on paragraph 5, but only on the particular question put to them. The Council decided merely to communicate the opinion of the jurists to the interested states.

---

[1] See, for example, the discussion arising out of the Council's right of investigation under the Treaties of Peace. *O. J.*, 1924, pp. 1315 *et seq.*

[2] See *O. J.*, 1926, p. 1244.

[3] *Records of the First Assembly*, Plenary, pp. 551–5, and *O. J.*, 1922, p. 1161.

[4] *O. J.*, 1922, p. 1160.

[5] *Ibid.*, p. 1193.

[6] *Ibid.*, p. 1191.

[7] *Ibid.*, pp. 1199, 1206.

[8] See Treaties of St. Germain, Art. 159; Trianon, Art. 143; Neuilly, Art. 104.

The distinction, therefore, suggested in these discussions, between consideration of a régime generally and of its application to a particular case, was not formally endorsed. In fact, however, it has been followed deliberately by the Council in dealing with minorities questions. Thus it is the settled practice of the Council that in discussions of the procedure to be followed in these questions the states concerned are not entitled to be present under Article 4, paragraph 5; and by adopting the jurists' report of March 6, 1929, the Council expressly approved this principle.[2] On the other hand, whenever the question involved is one relating to the operation of the system in any particular state, that state is invariably invited to be represented and has the full voting rights of an ordinary member.

One exception to these propositions must perhaps be made. Even when the question involved is the general operation of a system, nevertheless, if one of the states concerned has submitted proposals of its own which are to be considered by the Council, that state has, on occasion, been invited to be present. Thus Poland and Czechoslovakia were present during the discussions in 1923 of reforms in the minorities procedure proposed by them.[3] The early date of this occurrence renders it inconclusive. Furthermore, in the very same year the Council declined to invite the Canadian representative to be present during the discussion of a

---

[1] See *O. J.*, 1924, p. 1315.

[2] See *O. J.*, 1929, p. 512, for this report. For examples of the practice see *ibid.*, pp. 515 *et seq.*, 1005 *et seq.*

[3] *O. J.*, 1923, pp. 1427–30, 1290–3.

Canadian proposal to amend Article 10 of the Covenant.[1] In the 1929 discussions on reform of minorities procedure the precedent of 1923 was not followed. Though all the states concerned were invited to submit observations, there was no representation under Article 4, paragraph 5, at the Council discussions.[2]

What is "consideration" of matters?

Once it is decided that a state is entitled to representation under Article 4, paragraph 5, that state becomes entitled to sit during the discussion of all aspects, procedural or substantive, of the matter in which its special interest has been recognized. Thus, during the consideration of the dispute between Italy and Greece in 1923, the preliminary question arose whether the meeting should be public or private. Lord Robert Cecil said that he thought that at the discussion of this Greece ought to be represented under paragraph 5. The Italian representative (M. Salandra) opposed this, saying that he "did not think there was a dispute between Italy and Greece regarding the desirability of a public or private meeting". After a short discussion Lord Cecil gained his point and Greece was represented at the preliminary meeting.[3] A case somewhat inconsistent with this one, though not directly opposed, was that relating to the Commission of Inquiry sent to Albania in 1922. The representatives of Albania and Yugoslavia were represented at the meeting. The Yugoslav representative complained that the Commission was sending false reports to the Council concerning concentration of troops by his Government. M. Blinishti, the Albanian representative, asked that the matter be postponed for forty-eight hours, since he was only accredited to the Albanian Secretariat at the seat of the League, and his Government had not had time to appoint a representative. The President (M. Hymans) "observed that the question on the agenda did not necessitate the presence of a representative of the Albanian Government. They were dealing only with the instructions to be sent to the Committee of Inquiry." So far as he went M. Hymans was correct; the Council could certainly act in the absence of the Albanian representative. It is doubtful, however, how far his peremptory disposal of the Albanian request for an opportunity to be formally represented was justified.[4]

The rule acted upon in the Greco-Italian case must, it seems, be read subject to a very important qualification dictated by experience. It sometimes becomes desirable, particularly where disputes between states are involved, to have a private discussion by the Council in the absence of the states concerned. The circumstances are not difficult to imagine, but a simple illustration is at hand. In the Greco-Bulgarian dispute of 1925, at the end of the first public meeting after the Council had been seised under Article 11 of the Covenant, the Council went into private session. Both states were, of course, represented under Article 4, paragraph 5, of the Covenant. The President (M. Briand) said that he thought "the members of the Council, other than the representatives of the parties to the dispute, would desire to consider the matter among themselves. He hoped, therefore, that the representatives of Bulgaria and Greece would permit them to do so." The two representatives then retired. Later they were invited to return to a private meeting of the Council at which a draft resolution was approved.[1]

---

[1] *O. J.*, 1923, pp. 880, 987, 1286.

[2] *O. J.*, 1929, pp. 1134, 1156–78, 1105, and *ibid.*, Supplement No. 73, pp. 5–30.

[3] *O. J.*, 1923, p. 1276.

[4] *O. J.*, 1922, p. 98.

It is perhaps doubtful whether this action of the Council was legally quite regular. It does not seem to have been followed in the recent Sino-Japanese dispute. In that case, when it was necessary for the non-interested members to consult alone, they did so in their private capacity and not as the Council, though the declaration which they drew up was later communicated to the Council by the President.[2]

B. *Must all Members of the League entitled to be represented on the Council actually be so represented at the time a decision is taken?*

The other important problem which has been raised with regard to the composition of the Council when taking a decision is derived from the words of Article 5, paragraph 1, of the Covenant. This paragraph provides that:

> "Except where otherwise provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting."

It has been suggested that it is possible to construe this paragraph in such a way as to make the Council incapable of taking any decision unless all the Members of the League entitled to be represented are actually present.

Thus, in 1926, during the discussion concerning the withdrawal of Brazil from the League,[3] the Brazilian representative, M. de Mello Franco, said that his country

> "had not wished to carry out this decision (withdrawal) before the close of the

---

[1] *O. J.*, 1925, p. 1699. [2] *O. J.*, 1932, p. 336. [3] *O. J.*, 1926, p. 888.

last quarterly session of the Council preceding the ordinary session of the Assembly. . . . She was anxious to avoid giving rise by her resignation to any difficulty concerning the interpretation of Article 5 of the Covenant."

He further announced the startling proposition that

"in order that the Council may meet, the presence of all the representatives of its members is not necessary; but deprived of the presence of one of the states members, either owing to resignation or owing to a final severance from the League of Nations, the Council cannot take any decision or any action within its competence".

M. Scialoja (Italy), at the same meeting, did not commit himself on the legal problem raised, but M. Paul-Boncour summarily rejected the Brazilian proposition saying that ". . . nothing can prevent the Council from continuing its work in case of necessity".[1]

Though no conclusion can be drawn from the declarations at this meeting, it is significant that at its Forty-first Session in September 1926,[2] the Council sat for five days, doing its normal work in its normal way, in spite of the absence of two of its members, namely, Brazil and Spain. Both these states figure in the list of members prefixed to the minutes, and the absence of both is noted in the minutes. The Council, as newly constituted, opened its first meeting on September 16 with a full attendance.[3]

The Council may be taken, therefore, to have denied the Brazilian thesis. Indeed, it is difficult to see upon what grounds it might have been supported. Paragraph 1 of Article 5 refers to "Members of the League represented at the meeting", the French text being identical. It is impossible to construe the words "represented at the meeting" to mean "entitled to be represented at the meeting". Even if it were possible, such a construction would be eminently undesirable.

M. Ray[4] seems to regard the question as to some extent open. Messrs. Schücking and Wehberg[5] suggest that other provisions of the Covenant may require a full attendance in particular circumstances. Thus, under Article 16, paragraph 4, expulsion of a member must be by "a vote of the Council concurred in by the representatives of all the other Members of the League represented thereon ('*représentés au Conseil*')". The difference between this phrase and that used in Article 5, paragraph 1, is obvious, and it is plainly open to the restrictive interpretation. A similar doubt may exist as to Article 15, paragraph 6, which speaks of "a report by the Council . . . unanimously agreed to by the members thereof"; but the French text of this merely refers to "*le rapport du Conseil . . . accepté à l'unanimité*", which, read with Article 5, paragraph 1, would present no problem. Paragraph 7 of Article 15, however, in both the French and the English texts, speaks of the Council failing to reach "a report which is unanimously agreed to by the members thereof . . ." ("*Dans le cas où le Conseil ne réussit pas à faire accepter son rapport par tous ses Membres* . . ."). The same textual difficulty arises in paragraph 10 of the article which gives the same effect as that of a unanimous report of the Council to a report of the Assembly "concurred in by the representatives of those Members of the League represented on the Council . . . &c."

---

[1] *O. J.*, 1926, p. 891.

[2] *Ibid.*, pp. 1217–1398.

[3] *Ibid.*, p. 1401.

[4] *Op. cit.*, pp. 220 *et seq.*

[5] *Op. cit.*, p. 221.

In the case of these provisions of Articles 15 and 16, it is therefore possible to admit a certain doubt. Even here, however, the most that can be said for the Brazilian standpoint is that it is a possible one. In no case, it is submitted, is the wording so definite as to exclude the necessity of reading it subject to Article 5, paragraph 1. That article, from its position in the Covenant and from its express wording, must govern ambiguities in any other articles dealing with the same subject-matter. The submission that Article 15, paragraphs 6, 7, and 10, and Article 16, paragraph 4, must be read subject to it, is based not merely upon legal interpretation, but also upon the undesirability of ever preventing the Council from taking necessary decisions, even if by chance or by design a state entitled to be represented is not so represented.

II. THE UNANIMOUS VOTE

A. *What is the meaning of "the agreement of all the Members of the League, &c." ("à l'unanimité des Membres de la Société des Nations, &c.")?*

It was in its interpretation of the word "agreement" that the Assembly gave its first indication that so far as possible the rule of unanimity would not be allowed to stand in the way of effective action. Rule 19 (5) of the Assembly Rules of Procedure of November 30, 1920, provided that:

> "For the purposes of this Rule" (the Rule embodies Article 5 of the Covenant) "representatives who abstain from voting shall be considered as not present."[1]

In the same spirit the late Lord Balfour declared during the

---

[1] The Rules of the Assembly as now in force maintain this provision unchanged. See Hudson, *International Legislation*, Vol. I, p. 141. See *ibid.*, also, for Rules of Procedure of the Council, Financial Regulations, &c.

Tenth Session of the Council that "it would be well to establish the precedent that abstention from voting on a proposal did not amount to direct opposition, and that in such cases the Council was entitled to take a decision".[1] There is, however, no provision to this effect in the Rules of Procedure of the Council.

There is evidence, nevertheless, that the practice of the Council approximates to the rule established by the Assembly,[2] though it would require an exhaustive search of the Council minutes to confirm this beyond doubt.

Though the meaning given to "agreement" by the Assembly is a possible one, it would probably not have been resorted to in the absence of an imperious necessity of mitigating the serious difficulties arising from the application of Article 5, paragraph 1. In a body as large as the Assembly this necessity was felt much more acutely than in the Council. In so far as the Council has not found it necessary to endorse expressly the view of the Assembly, it has merely recognized the real difference between the two bodies in this respect.

In the light of these considerations there would be little to which to object even if, on the basis of the same text of Article 5, paragraph 1, the Assembly pursued one practice, and the Council another.

How much may turn on the distinction between an abstention and a hostile vote is illustrated by an incident at the Sixth Assembly. The Lithuanian representative, M. Galvanauskas, objected to the budget allocation to his state. "Not wishing, however, to take the responsibility of wrecking the League's budget for this year" by opposing the proposal, the Lithuanian delegation abstained from voting, and the budget was adopted. After the adoption M. Galvanauskas declared: "I maintain my former reservation. I do not consider the scale which has been established as binding for my country",[3] but no question was raised as to the validity of the decision.

---

[1] See *Minutes of the Tenth Session of the Council*, p. 46. The question arose owing to the abstention of the French representative on the question of the languages to be used by the Permanent Court of International Justice. It is difficult to decide what view was taken by the Council on the present point, but it is clear that the report was regarded as being "unanimously" adopted, and equally clear that M. Bourgeois abstained. The Council has recently appointed a committee to draw up new Draft Rules of Procedure "based on the procedure at present actually followed". See *O. J.*, 1933, p. 182. The Draft Rules of this committee are contained in Document C. 93. 1933. V.

[2] See, for example, *O. J.*, 1929, p. 1690, where the German representative abstained, and a decision was nevertheless taken.

[3] *Records of the Sixth Assembly*, Plenary, pp. 144–5. See Document A. 81, 1923, V.

In the Sino-Japanese dispute the Special Assembly adopted its resolution of March 11, 1932, affirming the principles involved and setting up the Committee of Nineteen, in spite of the abstention of both China and Japan. The President (M. Hymans) declared the resolution *unanimously* adopted by virtue of Rule 19 (5) of the Rules of Procedure.[1] In the same way the first progress report of and resolution proposed by the Committee of Nineteen were unanimously adopted, Japan abstaining, on April 30, 1932.[2] The Report of February 24, 1933, under Article 15, paragraph 4, of the Covenant, was declared unanimously adopted by the Assembly in spite of the abstention of Siam.

B. *Exceptions from and mitigations of the rule of unanimity.*

Under this head may be considered those derogations from the rule of unanimity which find a basis, more or less solid, in the text of Article 5. It will be seen throughout that both the Council and the Assembly have striven to reduce to a minimum the fetter imposed on normal activity by the first paragraph of the article.

The text of Article 5 is as follows:

> "Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.
>
> "All matters of procedure at meetings of the Assembly or of the Council, including the appointment of committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting."

(1) "*Where otherwise expressly provided in this Covenant or by the terms of the present Treaty.*"

Two difficulties have arisen in regard to these words. In the first place, since there was a separate Covenant, though in identical terms, in each treaty of peace, it would seem that in respect of a particular express provision "otherwise" contained in one of these instruments, the Council or the Assembly would in that particular case be acting under that particular instrument. An alternative method of overcoming the difficulty would be to say that in each case the Council acts under all four Covenants as derogated from by the exceptions in all four treaties of peace.[3]

---

[1] *Records of the Special Session of the Assembly*, p. 88.

[2] *Ibid.*, p. 99.

[3] Schücking and Wehberg, *op. cit.*, p. 222, and Ray, *op. cit.*, p. 226, merely note the difficulty. For full list of the exceptions in the Covenant and in the Treaties of Peace see Ray, *op. cit.*, pp. 224 *et seq.*

The second question relates to the absence from this exception in paragraph 1 of any provision for a case where some other treaty empowers the Council to act otherwise than unanimously. For instance, all the "minorities treaties" contain a provision allowing the Council to act by a majority in proposing modifications of their provisions.[1] Would the Council be prevented by Article 5 from acting under such a power?

The answer is clearly in the negative. The Permanent Court has expressed itself unequivocally in the same sense.[2]

In such cases the Council has generally agreed, in advance of the particular question arising, to accept the duty tendered to it, and by that agreement has authorized itself in all cases coming within the terms of the exception in the instrument, to act by a majority vote. This was what happened in the case of all the "minorities treaties". Even without such anticipatory acceptance there is no reason why, when the event in view occurs, the Council should not, as the instrument empowers it to do, act by a majority vote. In this latter case, however, a difficulty might arise if one of the interested parties, present either as an ordinary member or by virtue of Article 4, paragraph 5, challenged the power of the Council to act before it had formally accepted the function. A preliminary vote on that question would then be necessary, and, as unanimity would then be required, the interested state might effectively prevent any action. Though such a contingency is not likely to arise, its possibility makes it desirable, in such cases, to accept the provisions of the instrument so far as the League is concerned before any actual controversy has arisen.

It should be noted in the present connexion that in Rule 19 (1) of the 1920 Rules of Procedure of the Assembly[3] the words of Article 5, paragraph 1, of the Covenant are reproduced with the following modification. In place of the words "by the terms of *the present* Treaty", there are substituted the words "of *a* treaty".[4] Article 8, paragraph 1, of the Council's Rules of Procedure of May 17, 1920, makes the same change.

The express declarations of the Council, the Assembly, and the Court, and the practice of the Council all concur, therefore, in reading the words "the present Treaty" in paragraph 1 of Article 5 as if they were "a treaty". There is no reason to believe that this interpretation will ever be challenged, though from an abstract legal point of view a certain argument might be made against such an arbitrary extension of very clear phraseology.

---

[1] See e.g., Art. 12, par. 1, of the Polish treaty of June 28, 1919.

[2] *Publications of the Permanent Court of International Justice*, Series B, No. 12, p. 30: "No one denies that the Council can undertake to give a decision by a majority in specific cases if express provision is made for this power by treaty stipulations."

[3] *Records of the First Assembly*, Plenary, p. 240.

[4] This provision has not been changed by the amendments of the Rules in 1921, 1922, 1923, 1928, 1930, and 1932.

(2) *What are "decisions" ("décisions") within Article 5, paragraph 1?*

Both the Council and the Assembly have seized upon the word "decisions" and sought to show that many of the votes taken by them cannot properly be so characterized. Thus, there have been contrasted with decisions, "*vœux*" of the Assembly, and "recommendations" of the Council and the Assembly.

For example, in the report of Sub-Committee 2, of Committee I of the Second Assembly, three kinds of resolutions were distinguished:[1]

(*a*) Resolutions entailing new engagements by Members of the League. These require unanimity as well as the subsequent ratification of the Governments concerned, except where the new engagement is submitted in the form of an amendment to the Covenant, in which case Article 26 of the Covenant applies.
(*b*) Resolutions which merely formulate requests to the Council or to the Members of the League generally. These may be adopted by a majority vote.
(*c*) Resolutions on questions of procedure.

The Sub-Committee proposed that Article 5 be so modified as to allow resolutions of the second category to be adopted by a two-thirds majority of the members present at the meeting.

The First Committee displayed a typical reluctance to take any step so definite, and the Colombian and Netherlands representatives withdrew the above proposal which they had sponsored. Sir Cecil Hurst (British Empire)

> ". . . wondered whether any useful purpose was served in discussing the interpretation of the Covenant. . . . He thought that it was not worth while amending the Covenant in order to determine the method of voting on this question, and he asked the Committee to reject this proposal *and to comply with the usage* in this matter."

The Committee, therefore, decided to discontinue the examination of Article 5, but not before the representative of Greece had added yet a fourth category of resolutions, namely, those "to interpret the clauses of the present Covenant".[2] For this category he proposed that only a majority vote should be required. This proposal shared the fate of that of the Sub-Committee.

---

[1] *Records of the Second Assembly*, Committee I, p. 178.

[2] *Ibid.*, pp. 94–8. Cf. the Colombian proposal that a two-thirds majority be sufficient

The usage of the Assembly referred to by Sir Cecil Hurst is now well established. A "*vœu*", or expression of desire or desirability, either to the Council or to the Members of the League is regarded as requiring only a majority vote, though of course great effort is always made to achieve unanimity if possible. Whether, in the particular case, the resolution before the Assembly is a "*vœu*" or a decision, may be a difficult matter to decide. The following illustration drawn from the Records of the Second Assembly is not devoid of a touch of the comic.

After a long and acute discussion as to what treaties might properly be exempted from the unpleasant publicity conferred by Article 18 of the Covenant, Mr. Balfour had moved that:

> "The Assembly, taking note of the proposal for the amendment of Article 18, contained in the Report of Committee, No. 1, *decides* to adjourn further consideration of this amendment until the Third Assembly, it being understood that, in the meantime, Members of the League are at liberty to interpret their obligations under Article 18 in conformity with the proposed amendment."[1]

This was adopted by a majority vote on the assumption that it was a *vœu* or at worst a recommendation. At the next meeting the President (M. van Karnebeek) having, no doubt, found his mind troubled in the interval stated:

> "I must admit that at the outset I was of opinion that the motion in question was a recommendation, but . . . I am now of the opinion that what we had before us was a resolution" (i.e. a decision).

His reason was the use of the word "decides".[2]

The motion could not be regarded therefore as adopted, nor could it be said that it was rejected. M. Scialoja put the situation in these words:

> "If we say that it was rejected, the opposite interpretation becomes involved, and it might be thought that the interpretation adopted was the contrary of the interpretation proposed, which would be the exact opposite of the Assembly's intention. We must, therefore, say precisely that the proposal was not accepted, which, I think, will meet the case."

And so it was.[3]

---

where decisions of the Assembly aim merely at developing the provisions or principles laid down in the Covenant. Document C. 110, M. 62, 1921, V; A. 24, 1921, V (First Report of Committee on Amendments to the Covenant).

[1] *Records of the Second Assembly*, Plenary, p. 851.

[2] *Ibid.*, p. 895.

[3] For another example of the doubtful distinction see *ibid.*, pp. 887–8. Where dissent merely takes the form of abstention no question arises as to the nature of the resolution. See *Records of the Thirteenth Assembly*, Plenary, p. 80, where apparently serious opposition merely took the form of nine ineffective abstentions.

Apart from this difficulty of identification, the practice of the Assembly is clearly against the requirement of unanimity where merely *vœux* or recommendations are involved. Both Sub-Committee II, of the First Committee of the Second Assembly, mentioned above, and the Committee on Amendments to the Covenant[1] made a distinction between the Council and the Assembly in this regard. They endorsed the position described above so far as the Assembly was concerned. As to the Council, however, all resolutions, whatever their nature, decisions or mere recommendations, were to require a unanimous vote.

The reason for this discrimination may be given in the words of Sub-Committee II, which pointed out that

> "the Members of the Council are few in number: their opinions can all be clearly ascertained before a formal vote, and the discussion may be prolonged until an agreement is reached, which is a comparatively easy matter."[2]

The force of this argument is undeniable, and it seems sufficient to justify two distinct interpretations of the same word of the Covenant. Moreover, the practice of the Council, in which, except so far as Articles 15 and 16 are concerned, the recommendation is of small importance, seems to lend support to the suggested discrimination. The Council's principal self-exemptions from the rule of unanimity have taken rather the form of the extension of the meaning of "procedure" in the exception in Article 5, paragraph 2, shortly to be examined.

(3) *Practice in Committees of the Assembly.*

A further mitigation of the rule available to the Assembly, but only to a very small extent to the Council, is through the mechanism of committees. In its committees, where the greater part of the work of the Assembly is performed, the rule of unanimity is habitually disregarded. In theory, of course, decisions of the committee are not "decisions at meetings of the Assembly" within Article 5, paragraph 1.

In practice, however, and for natural reasons, a dissenting minority in the committees rarely maintains its opposition when the question is decided in plenary session. Moreover, by the practice of the Assembly, even if they only abstain at the plenary session that will not destroy unanimity. An example of such abstention may be seen in the budget incident of 1925 already mentioned in another connexion.[3]

---

[1] See Document C. 110, M. 62, 1921, V; A. 24, 1921, V, p. 12.

[2] *Records of the Second Assembly*, Committee I, p. 177.

[3] See *supra*, p. 32.

This practice of the committees of the Assembly, though now well established, has not gone entirely unchallenged, as may be seen from the following *résumé* from the minutes of a discussion in the Fourth Committee of the Sixth Assembly.[1] M. Zumeta (Venezuela) raised the question whether unanimity was not required for a vote on a purely budgetary issue which was not within any exception mentioned in Article 26 of the Financial Regulations and Article 19 of the Rules of Procedure. M. Réveillaud (France) said that if unanimity were required the Committee would get nothing done; that they were not taking decisions but merely making proposals to the Assembly; and that the minority would have an opportunity to oppose the definitive resolution in the Assembly. He added, somewhat inconsistently, that there was a tacit understanding in these matters that the minority would waive their objections in the plenary session. The Chairman, M. da Costa (Portugal), confirmed M. Réveillaud's statement. M. Zumeta then pointed out that his remarks had gone merely to the question of law.

> "He well understood what had been assented to in practice. He merely desired to record his opinion that that assent, however long established the practice might become, would never be anything more than a voluntary submission to a plain derogation from the strict requirements of the law."[2]

In the Sino-Japanese dispute the Assembly seems to have regarded itself as unfettered by the rule of unanimity when sitting in General Commission, though no clear-cut issue arose.[3]

(4) *What are "matters of procedure" within Article 5, paragraph 2?*

Paragraph 2 provides that:

> "All matters of procedure at meetings of the Assembly or of the Council, including the appointment of committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting."

In the French text "the appointment" is represented by "*la désignation*", which, if anything, seems to limit the meaning of this phrase to the actual nomination of the committees.

This paragraph contains a very important derogation from the rule of unanimity, dictated by the necessity of making it possible for action of some sort to be taken even in the absence of general agreement. The tendency here again is for the Council and the Assembly to give the exception to the rule a very broad interpretation.

---

[1] *Records of the Sixth Assembly*, Committee IV, p. 60.

[2] For a previous occasion on which the question was raised see *Records of the Second Assembly*, Plenary, p. 374.

[3] *Records of the Special Session of the Assembly*, I, pp. 43, 87.

It should first be noted that the words "including the appointment of committees to investigate particular matters" is not in apposition to "all matters of procedure" so as to cut down any construction which those words can reasonably bear. They are either simply illustrative of what is meant by procedure, or demonstrative that such appointments must be considered to be a matter of procedure within the paragraph. In either case they set no limits to the scope of "matters of procedure" within the paragraph as a whole.

The meaning in practice attributed to "the appointment of committees to investigate particular matters" may conveniently be examined first. The Council has clearly held the *establishment* of a committee to fall within the meaning of "appointment". Thus during the Polish-Lithuanian dispute it was proposed in the Council in 1922[1] to send a commission to the disputed area to trace a frontier line.

> "The Lithuanian representative also refused to accept the Council's proposals. . . . In this matter, however, M. Hymans thought that the Council could take a decision despite the opposition of the Lithuanian representative. It was merely a question of procedure and in this the Council could take a decision by a majority."

The Council thereupon adopted the proposal.

That "appointment" includes nomination was expressly decided in the course of the Council's discussions concerning the execution of the military, naval, and air clauses of the treaties of peace.[2] This is the very narrowest meaning that the term can have, and as such does not call for further discussion.[3]

Lastly, it is still undecided whether steps taken pursuant to the work of such a committee, for instance the adoption of its reports, or the execution of its proposals, come within the exception to the rule of unanimity. Little doubt can be entertained that such subsequent steps, in so far as they involve anything other than procedure, would require the unanimous consent of the Council.

It is not clear whether a decision by the Council or the Assembly that a given matter is a matter of procedure is itself a decision on a matter of procedure. An affirmative reply seems to be indicated by the action of the Council in 1931 when it was held by a majority of the Council that the issuance of an invitation to the United States to sit "at the Council table"[1] was a matter of procedure. The Japanese representative protested unavailingly against this action.[2]

---

[1] See *O. J.*, 1922, pp. 549–52.

[2] A discussion arising on somewhat analogous treaty texts is to be found in *O. J.*, 1925, pp. 136–9, 608. See also *ibid.*, 1932, pp. 1751–2.

[3] The resolution appointing the Commission of Investigation in the Sino-Japanese dispute was adopted by a unanimous vote, inclusive of the votes of the disputant states. *O. J.*, 1931, pp. 2374–8 (Resolution of December 11, 1931).

Matters of procedure in the case of both Council and Assembly clearly include the adoption or modification of rules of procedure, of agenda, the election of officers such as president, vice-president,[3] and *rapporteurs*,[4] and other similar matters on which little controversy is likely to arise. They would also appear to include the determination by the Council whether a matter on the agenda specially affects the interests of a Member of the League not represented on the Council so as to entitle it to representation under Article 4, paragraph 5, of the Covenant. There is, however, no definite ruling on this point.

The Rules of Procedure of the Assembly were adopted in 1920 by a simple majority vote,[5] and Rule 19 (3) provides that "all decisions taken in virtue of these rules shall be considered as matters of procedure". There can be no doubt that amendments would be held to require only a majority vote.[6] The Rules of Procedure of the Council do not contain any provision corresponding to Rule 19 (3) of the Rules of the Assembly, but there seems no reason to doubt that the position with regard to them is similar.

For the Assembly, procedure has definitely been held to include the election of non-permanent members of the Council. Article 4, paragraph 3, of the Covenant had provided for *the fixing of regulations* relating to election by a two-thirds majority, but had said nothing as to the election itself. The report of Committee I adopted by the First Assembly, after setting out the proposed mode of proceeding in the elections, concluded: "The present provisions shall be deemed matters of procedure within Article 5, paragraph 2, of the Covenant."[7] Article 22a of the Rules of Procedure of the Assembly now provides that the election of non-permanent members of the Council shall be by an absolute majority, and in certain cases by a simple majority. Further, under the rules made by the Assembly on September 15, 1926,[1] concerning the election of non-permanent members of the Council, their term of office, and conditions of re-eligibility, a two-thirds majority vote is required for decisions as to re-eligibility of retiring members,[2] and for a decision to proceed to a new election of all the non-permanent members of the Council. The Assembly practice is to exclude blank or spoiled ballot papers in calculating a majority in election cases.[3]

---

[1] *O. J.*, 1931, p. 2329.

[2] *Ibid.*, pp. 2323–35.

[3] See Rules of Council and Assembly, Rules 4 and 7 respectively.

[4] See, e.g., *O. J.*, 1928, p. 1652.

[5] For discussion see *Records of the Second Assembly*, Committee I, p. 179. As to the applicability of the Rules of Procedure to Special Sessions of the Assembly, see *Records of the Special Session of the Assembly*, pp. 24, 88–9.

[6] See Document C. 110, M. 62, 1921, V; A. 24, 1921, V, p. 13.

[7] *Records of the First Assembly*, Committee I, p. 107, Plenary, pp. 423, 559. For an example see *Records of the Thirteenth Assembly*, Plenary, p. 30.

The rules for the election of non-permanent members of the Council, and the resolution of September 15, 1926, were applied in the election of the six states, other than those represented on the Council, and the President of the Assembly, to be represented on the Committee of Nineteen in the Sino-Japanese dispute in 1932.[4]

The Rules of Procedure of both the Council and the Assembly provide in Articles 9 and 21 respectively that decisions relating to individuals require only a majority vote.

In only one respect, but one of vital importance, has the Council refused to take an extensive view of the meaning of "matters of procedure". This is in respect of requests to the Permanent Court of International Justice for advisory opinions under Article 14 of the Covenant. This topic is too far-reaching and too complicated to be examined incidentally here. The problems which it presents are of a peculiar character which require separate treatment.[5]

In concluding this examination of the meaning of procedure it should be noted that Rule 19 (4) of the Rules of the Assembly makes the last phrase of Article 5, paragraph 2, more definite by providing that:

> "A majority decision requires the affirmative votes of more than half the Members of the League represented at the meeting."

---

[1] *Records of the Seventh Assembly*, Plenary, pp. 79–80.

[2] For example see *Records of the Thirteenth Assembly*, Plenary, p. 46.

[3] *Records of the Thirteenth Assembly*, Plenary, pp. 54–5.

[4] *Records of the Special Session of the Assembly*, p. 89.

[5] For a critical account of the practice in this regard before 1926 see McNair, "The Council's Request for an Advisory Opinion, etc." in this *Year Book*, Vol. VII, pp. 1 *et seq.*, and citations there given. The writer has dealt with the matter in so far as it concerns minorities questions in Stone, *International Guarantees of Minority Rights*, London, 1932, pp. 185 ff. See also Hammarskjöld in IX *Revue de Droit international et de Législation comparée*, 1928, pp. 694 ff.; and P. M. Brown in 22 *American Journal of International Law*, 1928, pp. 599–603.

CONCLUSION

A fitting text with which to characterize the attitude of the Council and the Assembly towards the rule of unanimity is to be found in an observation of Sub-Committee II, of the First Committee of the Second Assembly that "... the rule regarding unanimity, laid down in Article 5 of the Covenant is not, *if wisely interpreted*,[1] prejudicial to the activities of the Assembly".[2] If this is extended to cover the activities of the Council, and if it is remembered that often no interpretation has been found to be the wisest interpretation, the characterization is complete. Here, as elsewhere, the organs of the League, and particularly the Council, have been reluctant to bind themselves more rigidly than necessary, lest they should hinder their action in unforeseen future contingencies. This reluctance is a healthy one and by no means to be condemned.

[1] Italics the writer's.

[2] *Records of the Second Assembly*, Committee I, p. 177.

THE REVISION OF INTERNATIONAL LABOUR CONVENTIONS

By C. WILFRED JENKS,

Member of the Legal Section of the International Labour Office.

I

The Revision of Law-making Conventions in General

Increasing attention has been devoted in recent years to the importance of discriminating between varying types of treaty as a preliminary step towards the formulation of rules concerning their conclusion, interpretation, effect, and validity which will be of clearer and more certain application than the somewhat elementary principles at present generally acknowledged.[1] Such discrimination is particularly necessary as a condition of any real progress towards the development of workable procedures of treaty revision. The problems involved in the revision or termination of multipartite Conventions of a law-making character are quite distinct from those which confront the student of bipartite instruments. The fundamental objective is the same in both cases. πάντα ῥεῖ was the maxim of Heraclitus and it has lost none of its cogency in the twentieth century. If the law of nations is to serve satisfactorily the needs of our time, it must provide machinery for the adaptation, as necessary, of existing treaty obligations to changing political, social, economic, and technological conditions.[2] But while the objective is the same and while certain legal principles or rules of construction may be applicable to all types of treaties,[3] there are at least two characteristic features of the problem of the revision of law-making treaties which have no parallel in that of the revision of bipartite instruments. The revision of legislative treaties may be necessary, and yet a matter of some difficulty, in order to bring them generally into force.[1] It was once said by Lord St. Leonards that "nothing is so difficult as to construct Acts of Parliament properly; and nothing so easy as to pull them to pieces".[2] His words do not lose in appropriateness if applied to international Conventions which have often to be drafted in two or more languages in texts of equal authenticity, and are almost always adopted by conferences of varying types under conditions which magnify many times the difficulties inherent in any form of parliamentary procedure as a method of legislation. In national experience various devices have been evolved to counter these difficulties—relegation to regulations of questions of detail, Henry VIII clauses and amending Acts, to mention only British examples.[3] It is even more necessary in international life that there should exist some machinery for correcting the initial faults of the legislator and thereby facilitating ratifications. The absence of adequate machinery for this purpose often prevents or indefinitely delays the coming into force of law-making Conventions.[4] The second characteristic feature is the unusual degree to which, in the case of law-making treaties, the term "revision" distracts attention from the substance of the problem to a single formal aspect of it. It is comparatively unusual for law-making treaties to be expressed as binding in perpetuity, and in principle this is a healthy practice.[5] The problem is, therefore, less that of terminating obligations against the will of one party in the absence of any specific procedure for such termination, than that of facilitating the coming into force, for all parties concerned, of a modified Convention. This may be done in a variety of ways, of which organized provision for the revision of treaties is only one. Procedures permitting reservations will sometimes be an alternative to revision as a method of facilitating ratifications.[1] In other cases they will facilitate revision by making the revised Convention more generally acceptable.[2] In still other cases the delegation of authority to international bodies[3] and a far-sighted use of resolutive conditions and of articles permitting denunciation[4] will make unnecessary any further provision for modification. No attempt will be made here to survey these alternatives, but it is essential to keep them in mind

---

[1] See particularly McNair, "The Functions and Differing Legal Character of Treaties", in *British Year Book of International Law*, 1930, pp. 100–18.

[2] For a general survey of the problem of change see Fischer Williams, *International Change and International Peace.*

[3] For the doctrine of *rebus sic stantibus* see Lorimer, "The ultimate Problem of International Jurisprudence" in his *The Institute of the Law of Nations*, Vol. 7, and Fischer Williams, "The Permanence of Treaties", in *American Journal of International Law*, 1928, pp. 89–104, where it is discussed on the basis of an analogy with contracts in national law. Though not of primary importance for the revision of law-making treaties it would not appear to be entirely without application to them. I submit as a possible view that its operation has now made void the Declaration of Paris and the neutrality provisions of the Hague Conventions, the implied conditions upon which they were concluded having disappeared with the coming into force of the Covenant and Pact of Paris.

---

[1] For a recent attempt to devise a procedure for such cases see Section I of the Protocol of Signature of the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, Geneva, July 13, 1931, in *League of Nations Official Journal*, September 1931, at p. 1819.

[2] *O'Flaherty* v. *McDowell*, 6 H.L. Cas. 179.

[3] On this subject see Report of the Committee on Ministers' Powers (Cmd. 4060 of 1932), particularly the review of *Normal and Exceptional Types of Delegated Legislation* at pp. 30–41.

[4] The length of the delays which may occur is illustrated by the fate of the Convention on Safety of Life at Sea, London, January 20, 1914, which was only ratified by a few states but not replaced, admittedly in part owing to the war, until the signature at London on May 31, 1929, of a revising Convention which came into force on January 1, 1933, for eleven of the principal maritime countries (listed in *U.S. Treaty Information Bulletin*, No. 40, at pp. 15–16.)

[5] Instruments intended as part of the constitution of international society are on a special footing. It is undesirable that they should be subject to denunciation but important that there should be reasonable facilities for their modification. Article 26 of the Covenant, with which compare Article 422 of Part XIII, is not a satisfactory solution of the problem. The Statute of the Permanent Court of International Justice makes no provision for its modification, and the American Accession Protocol of September 14,

---

1929, expressly reaffirms in Article 3 the necessity of unanimous consent for this purpose. P.C.I.J. Series D, No. 6, *Collection of Texts Governing the Competence of the Court*, p. 28, or Hudson, *International Legislation*, Vol. I, pp. 594–5.

[1] Procedures of special interest are defined in: (1) the Protocol to the International Convention relating to the Simplification of Customs Formalities of November 3, 1923, paragraph beginning "Any exceptions which may subsequently be formulated . . ." (XXX *League of Nations Treaty Series* at p. 409, or Hudson, *op. cit.*, Vol. II, at p. 1122); (2) Articles 6 and 17 of the Convention on the Abolition of Import and Export Restrictions, Geneva, November 8, 1927, Section IV (*d*) of Protocol thereto, and Articles A and B of Supplementary Agreement of July 11, 1928 (XCVII *League of Nations Treaty Series* at pp. 405–7, 411, 415–17, 429–31, and 443–5, or Hudson, *op. cit.*, Vol. III, at pp. 2165–6, 2171, 2174–6, 2181–2, 2185–7; and (3) Article 17 of the International Convention relating to Economic Statistics of December 14, 1928 (CX *League of Nations Treaty Series* at p. 191, or Hudson, *op. cit.*, Vol. IV, at p. 2588), and Article 22 of the International Convention for the Suppression of Counterfeiting Currency of April 20, 1929 (CXII *League of Nations Treaty Series* at p. 384, or Hudson, *op. cit.*, Vol. IV, at p. 2702) which, though differently worded, is to the same effect.

[2] For a clause permitting ratification of a revising convention subject to reservations in favour of replaced provisions, see Article 16, par. 2, of Convention revising the Buenos Aires Convention of 1910 concerning Literary and Artistic Copyright, adopted by the Sixth International Conference of American States, February 20, 1928 (Hudson, *op. cit.*, Vol. IV, at p. 2373). Of doubtful desirability at any time, this expedient is clearly of limited value.

[3] A notable example is Article 4 (2) of the Covenant which permits the Council and Assembly acting together to increase the size of the Council. Contrast the difficulty experienced by the I.L.O. in attempting to increase the size of the Governing Body by amendment to Part XIII which, though adopted in 1922, is still not in force at the time of writing (April 1933). For a different type of case note the power of the International Commission for Air Navigation to fix standard minimum requirements governing the issue of certificates of airworthiness. For power see XI *League of Nations Treaty Series* at p. 247, or official edition of Convention published as amended from time to time by the International Commission for Air Navigation. For exercise of power see Regulations in numbers of Official Bulletin of Commission listed in official edition of Convention.

[4] On the limitations of this line of approach see Brierly, "Some Considerations on the Obsolescence of Treaties", in *Transactions of the Grotius Society*, Vol. XI, pp. 11–20.

in considering the development of procedures of revision and of amendment.[1]

The first step in the evolution of procedures of revision and amendment properly so called is naturally to make arrangements for a further discussion of the Convention in question, either by a general conference[2] or by correspondence between the parties. The effective organization of such discussion will often facilitate the coming into force of a modified Convention, though for this purpose ratification by all the states to be bound by the new Convention will, in the absence of further provision, remain necessary. The next step is to introduce procedures which dispense with fresh ratifications for certain types of modification. The change may be no more than a relaxation of formalities, it being provided that the Convention, or certain of its provisions, may only be modified with the consent of all the parties, but that such consent may be expressed less formally than by the ratification of a new Convention.[3] Such a relaxation may have an importance in the constitutional law of certain countries by making unnecessary parliamentary approval of the modification of a Convention, but internationally it is not a substantial improvement. More important are the cases in which fresh ratifications have been dispensed with under procedures involving some relaxation of the requirement of unanimous consent. In some cases absence of any objection to a proposed amendment during a stated period is treated as equivalent to consent,[1] in others certain provisions of Conventions or of regulations annexed thereto may be modified with the approval of a simple or reinforced majority;[2] in others international bodies have power, in respect of certain provisions, to adopt amendments which have executory force without any approval by national authorities.[3]

---

[1] There is some authority in international practice for using the term "revision" to describe procedures involving fresh ratifications by all parties to be bound by the revised convention and "amendment" to describe procedures which dispense with either ratifications or unanimity. The distinction is a useful one.

[2] It is now very common for general conventions to contain a clause contemplating their revision, but such clauses vary considerably, particularly in respect of the following matters: (*a*) the existence or absence of a period of years until the expiry of which they may not be invoked; (*b*) the number of states who must act to set the procedure in motion or approve an initiative taken by one party for this purpose—under many conventions a third of the parties must be in favour of revision; (*c*) the authority responsible for convening a revising conference, generally either the Council of the League of Nations or a head-quarters government; (*d*) the extent to which that authority must act automatically once a certain number of states are in favour of revision, or is entitled to exercise its discretion in considering whether to give effect to their request for a conference; and (*e*) the existence or absence of an explicit undertaking by all parties to be represented at a revising conference. The great variety of current practice makes it impossible to refer to any such clause as typical or indeed to give any illustrations without discussing the matter at length.

[3] e.g. Article 61, para. 1, of the Convention on Safety of Life at Sea, London, May 31, 1929 (Hudson, *op. cit.*, Vol. IV, p. 2766), and, identical in substance but slightly different in wording, Article 20, para. 1, of the International Load Line Convention, London. July 5, 1930 (*Supplement to U.S. Treaty Information Bulletin*, No. 12, at p. 13).

II

The Formulation of the I.L.O. Procedure

In this article it is proposed to consider the bearing upon the problem sketched above of the experience of the International Labour Organization. This experience has naturally borne the stamp of the peculiar characteristics of International Labour Conventions, which are not self-contained instruments and must always be read in conjunction with the Constitution of the Organization, Part XIII of the Treaty of Versailles. Part XIII provides for the establishment of a permanent organization consisting of a General Conference of the Representatives of the Members and of an International Labour Office under the control of a Governing Body.[4] Each Member is represented in the General Conference by four representatives, of whom two are Government delegates and two must be chosen in agreement with the industrial organizations most representative of employers and workpeople respectively.[5] The agenda of the Conference is settled by the Governing Body,[6] which likewise includes not only Government delegates but also members elected by the employers' and workers' representatives at the Conference.[1] Proposals adopted by the Conference with regard to an item on its agenda may take the form either of a Recommendation to be submitted to the Members for consideration with a view to effect being given to it by national action, or of a Draft International Convention for ratification by the Members.[2] A two-thirds majority is necessary on the final vote for the adoption of Recommendations or Draft Conventions, which are signed on behalf of the Conference by its President and Secretary-General but not individually by the delegates who voted for their adoption.[3] Each Member is then under an obligation to bring each Recommendation and Draft Convention before the authorities competent to give municipal effect to it, and, whenever these authorities approve a Convention, to communicate its formal ratification of that Convention to the Secretary-General of the League of Nations.[4] This obligation is binding upon Members even in respect of Conventions the adoption of which has been consistently opposed by their representatives.

---

[1] This device is found in its simplest form in Article 86, § 9, of the Service Regulations annexed to the International Telegraph Convention of St. Petersburg (July 22, 1875) as revised at Paris, October 29, 1925 (LVII *League of Nations Treaty Series* at p. 375, or Hudson, *op. cit.*, Vol. III, at pp. 1753–4.)

[2] See especially Articles 18–22 of Universal Postal Convention, London, June 28, 1929 (CII *League of Nations Treaty Series* at pp. 263–7, or Hudson, *op. cit.*, Vol. IV, at pp. 2878–80), and equivalent articles of each of Postal Union Agreements and Detailed Regulations.

[3] e.g. power of International Commission for Air Navigation to amend annexes to Convention under Article 34 thereof (XI *League of Nations Treaty Series* at p. 196, or Hudson, *op. cit.*, Vol. I, at p. 371). Protocols modifying the composition of the Commission were adopted by it on June 30, 1923, June 15, 1929, and December 11, 1929, and submitted to the parties to the Convention for ratification as required by Article 34 for changes in the Convention itself. For text in force at any given time see latest issue of official edition of Convention referred to above.

[4] Article 388.

[5] Article 389, para. 1.

[6] Article 400. Article 402 defines a procedure for taking off the agenda questions placed thereon by the Governing Body and empowers the Conference itself to place a subject upon the agenda of its next session.

The fact that the procedure for the adoption of Conventions is determined by treaty provisions in this way gives a special character to the problem of their revision. There is no reference to revision in Part XIII. At the First Session of the International Labour Conference, an attempt was made to fill the gap and there was included in each of the Conventions adopted an article in the following form:

> "At least once in ten years the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention, and shall consider the desirability of placing on the agenda of the Conference the question of its revision or modification."[5]

The same course was adopted at subsequent sessions of the

---

[1] Article 393. There is an outstanding amendment to this article, designed to increase the number of members of the Governing Body, not yet in force.

[2] Article 405, para. 1.

[3] Article 405, para. 4.

[4] Article 405, paras. 5 and 7.

[5] Article 21 of the Hours of Work (Industry) Convention 1919 and equivalent articles of other Conventions. The text of the International Labour Conventions cited in this Article are available in (*a*) a booklet entitled *Draft Conventions and Recommendations adopted by the International Labour Conference,* published from time to time by the I.L.O.; (*b*) the *Official Bulletin* of the I.L.O. in which they are published shortly after adoption by the Conference; (*c*) the *Final Record* of the session of the Conference at which they were adopted; and (*d*) Hudson, *International Legislation.* In this article they are cited by the short titles allocated to them by the Office in 1933 in pursuance of a decision taken by the Governing Body at its Sixtieth Session.

Conference, and an article in the same form was inserted in all Conventions adopted at its first eleven sessions. The implications of this article were not fully examined until 1928. The possibility of introducing some special procedure for the amendment of Conventions in points of technical detail was considered by the Conference at its Third and Fourth Sessions,[1] but the objective then in view was some simple procedure to be introduced by the insertion of a new standard article in future Conventions and only permitting of quite minor changes, and the question was discussed without any special reference to the revision article adopted at Washington. By 1928 consideration of the implications of this article was becoming urgent, for the ten-year period within which the Governing Body is required by it to report to the Conference on the desirability of revision was due to expire in 1931 in respect of the eight Conventions which had come into force during 1921. The question was considered by the Governing Body at its Thirty-eighth, Thirty-ninth, Forty-third, Forty-fourth, and Forty-fifth Sessions and by the Conference at its eleventh and twelfth Sessions,[2] and the outcome of lengthy discussions was the inclusion in the Standing Orders of the Governing Body and Conference of special articles defining revision procedure and the approval by the Conference of a new form of revision article intended for insertion in all future Conventions.

In the course of these discussions interesting questions were raised as to the powers of the International Labour Conference and the legal nature of International Labour Conventions. There was general agreement that, since neither Part XIII nor the revision clauses of Conventions defined any procedure for revision, the Conference had no other means of action at its disposal than the adoption of a new Draft Convention, which all Members would be obliged, by the normal operation of Article 405, paragraph 5, of Part XIII, to submit for the approval of their competent authorities. Disagreement began with the attempt to determine the effect upon the validity of the original Convention of the adoption and/or coming into force of a new Convention upon the same subject. Three aspects of this question claimed attention. It was necessary to consider whether the adoption of a new

---

[1] See particularly *Report on the Institution of a Procedure for the Amendment of Conventions* submitted by the I.L.O. to the Sixth Session of the International Labour Conference, 1924.

[2] *International Labour Conference, Eleventh Session, Geneva 1928, Final Record,* Vol. I, pp. 297–310 and 591–612, *Twelfth Session, Geneva 1929, Final Record,* Vol. I, pp. 340–60, 717–80, 782–803, 807–11.

Convention involved the abrogation of the old, whether, if abrogation was involved, the old Convention would still remain open to ratification after the adoption or coming into force of the new Convention, and whether a Member which ratified a revising Convention could thereby be released from its obligations under the old Convention. The Legal Adviser of the I.L.O., in a memorandum submitted to the Thirty-eighth Session of the Governing Body,[1] rejected the view advanced in some quarters that the adoption by the Conference of a revising Convention involves the abrogation of its predecessor, partly on the ground that the Conference is incompetent to abrogate a Convention which has become to some extent the property of the Members which have ratified it, partly because the effect of such a construction would be to release Members from obligations already undertaken without subjecting them to any alternative obligations and in the absence of any guarantee that they will ratify the revising Convention, but suggested that while the Conference is not competent to abrogate an existing Convention it is competent to liberate from its engagements under an existing Convention a state wishing, before the unrevised Convention is subject to denunciation, to substitute for its ratification thereof ratification of the new Convention. The presence in all Conventions of a clause providing for the possibility of revision could be construed, he argued, as a waiver of any right to object to such release by the Conference from obligations which have assumed by ratification a partly contractual character, though this aspect of the question would only become of practical importance if at any time it was desired to revise a Convention not yet subject to denunciation. Certain members of the employers' group took a different view and contended that International Labour Conventions are not contracts between states and that the International Labour Conference is, therefore, master of their future.[2] To quote an apt expression of Mr. Oersted, Danish employers' delegate, they are "conditional international laws", which the Conference is not competent to impose upon the Members of the Organization, but which it may modify without their consent, though the effect of such modification cannot be to impose the modified versions upon Members which have ratified the originals. The alternative view, that the adoption of a revising Convention has no effect upon the validity of the earlier Convention, Mr. Oersted rejected as inconsistent with the purpose of international labour legislation, the promotion of uniformity. He admitted that acceptance of the abrogation theory would compromise the results already achieved by the Organization, but suggested that this danger could be avoided by the insertion in the revised Convention of a provision that it should only come into force on ratification by all Members bound by the old one. A similar view was put forward by Mr. Olivetti, Italian employers' delegate, who construed the obligations resulting from International Labour Conventions as the outcome of (1) a decision of the Conference laying down a *règlement type* for a particular question, and (2) ratifications representing unilateral undertakings by Members to observe as *norma agendi* the decisions of the Conference. Ratification, in his view, ceases to be an act of acceptance of a contractual obligation and becomes a suspensive condition upon the fulfilment of which depends the coming into force of the decisions of a law-making Conference. The practical conclusion at which Mr. Olivetti arrived was that the adoption by the Conference of a new *règlement type* discharges Members from their unilateral undertakings to apply its predecessor, but that, as a matter of expediency, such discharge should be made conditional upon its ratification of the revising Convention. The Standing Orders Committee of the Governing Body, before which these arguments were first expounded, refrained from expressing any opinion upon the legal nature of Conventions and attempted to confine its rôle to that of formulating workable proposals. So far as the future was concerned, it had a clear field before it and recommended—and its views were successively endorsed by the Governing Body and the Conference—the inclusion in future Conventions of an article providing in respect of them (*a*) that the adoption of a revising Convention does not involve the abrogation of its predecessor; (*b*) that the old Convention shall no longer be open to ratification after the coming into force of the revising Convention; and (*c*) that ratification of a revising Convention involves *ipso iure* denunciation of its predecessor, even where the period during which denunciation is otherwise impossible has not yet expired. In respect of existing Conventions theoretical considerations could not be ignored so completely, for it was clearly impossible, without a full examination of them, to reach valid conclusions upon the power of the Conference to abrogate, close to further ratification, or release Members from their obligations under, Conventions which make no provision for these possibilities. Both the Governing Body and the Conference, while impliedly rejecting the view of the employers' group, refrained from adopting any general attitude towards these questions of principle. They decided not to advise the inclusion in Conventions effecting revision of a provision purporting to abrogate the old Convention or closing it to further ratification, and did not discuss what provision should be made for the denunciation by ratification of a revising Convention of a Convention not already subject to denunciation by lapse of time. It follows that while Conventions adopted in the years preceding and following 1929 are alike in not being subject to abrogation by a vote in the Conference, the rules upon the other two points referred to differ according to whether a Convention does or does not contain the new form of revision article approved by the Conference in that year. For Conventions containing this article the position is clear. For earlier Conventions it would appear that, unless provision to the contrary is made at the time of revision, they will remain open to ratification despite the coming into force of a revising Convention and continue to bind a Member until denounced as permitted by their terms after it has become bound by a revising Convention. Whether it would be competent to the Conference to make provision to the contrary when adopting a revising Convention cannot be considered a finally settled question.

---

[1] *International Labour Conference, Twelfth Session, Geneva 1929, Final Record,* Vol. I, Third Part, pp. 727–61, note by Mr. Morellet.

[2] See memoranda by Mr. Oersted and Mr. Olivetti at pp. 762–9 of same volume. For a criticism of their views see Mahaim, "Les Conventions Internationales du Travail" in *Revue de Droit international et de Législation comparée*, 1929, pp. 699–734, and 1930, pp. 123–46. For a general discussion of the legal nature of International Labour Conventions see Scelle, *L'Organisation internationale du Travail et le B.I.T.*, 1930 at pp. 181–5. Scelle also discusses revision at pp. 220–32.

The legal effect of the adoption of a revising Convention was not the only matter which required consideration. There were also procedural questions of some importance upon which decisions were necessary. One such question—the possibility of limiting the scope of revision by wording restrictively the agenda of the Conference—aroused keen controversy. It was argued by the employers' group that the Governing Body was incompetent so to limit the freedom of the Conference, but their view was overruled and there was inserted in the Standing Orders of the Conference a paragraph providing that

> "The Conference shall not revise, in whole or in part, a Convention previously adopted by it, save in respect of the question or questions placed by the Governing Body on the agenda of the Session."

This implies that in any case in which the Governing Body places upon the agenda of the Conference the total revision of a Convention the Conference has a free hand, but that when only partial revision is placed upon its agenda it can only discuss the points selected for revision. Governments are thereby protected from unexpected discussion of questions for the preliminary examination of which they have had no adequate opportunity, and workers' delegates are given a guarantee that questions decided in their favour in the Convention under revision and not specifically placed upon the agenda of the Conference will not be reopened. The existence of these guarantees has a twofold value. (1) Reluctance to consider revision is thereby diminished and it thus becomes less difficult to have proposals for revision included in the agenda of the Conference. (2) They make possible a valuable simplification of the procedure of the Conference. The article in the Standing Orders of the Conference which defines the procedure for the adoption of new Conventions now provides that all items upon which it is intended to adopt a Convention shall appear upon its agenda in two successive years, only a discussion of principles taking place in the first year, and the adoption of a text being reserved until the second discussion.[1] Limitation of the scope of revision makes this somewhat elaborate procedure unnecessary when a revising convention is under discussion, and the Standing Order defining revision procedure provides for the adoption of revising Conventions after a single discussion.

The other points regulated by the Standing Orders of the Governing Body and Conference, notably the manner in which Governments are consulted before proposals for revision are placed on the agenda of the Conference and the procedure whereby amendments are adopted by the Conference and subsequently incorporated by the Drafting Committee with the unamended provisions of the Convention under revision before the Conference is asked to take a final vote on the text as amended, will not be considered at length here.[2]

---

[1] Article 6 of the Standing Orders of the International Labour Conference. (Available in I.L.O. publication—*International Labour Organization: Constitution and Rules.*) For a brief account of the development of the present procedure see Scelle, *op. cit.*, pp. 169–72. For the equally elaborate procedure now governing the adoption of conventions under the auspices of the League of Nations see *Official Journal*, Special Supplement 92 at p. 11, or 93 at p. 226.

[2] For this and related questions see the passages of the *Final Record* of the International Labour Conference referred to above.

III

The Working of the I.L.O. Procedure

Since the above rules were formulated in 1929, several opportunities have occurred of testing their practical application. In 1931 the Conference unsuccessfully attempted to revise the Night Work (Women) Convention, 1919;[1] in 1932 it adopted a Convention revising the Prevention of Accidents (Dockers) Convention, 1929;[2] and its agenda for 1934 includes the partial revision of the Workmen's Compensation (Industrial Diseases) Convention, 1925. The consideration given to these cases by the Governing Body and the Conference has underlined some of the advantages and disadvantages of the existing procedure, and the discussions which have taken place in the interval upon certain other Conventions have made clear some of its limitations.

An incident which occurred during the attempted revision of the Night Work (Women) Convention illustrates the importance under this procedure of including specifically in the agenda of the Conference all points the revision of which it may be desired to discuss. On this occasion the Drafting Committee found itself unable to include in the revising Convention the improved denunciation and revision articles adopted in 1929. It was generally agreed that their inclusion was desirable, but the point was not upon the agenda and the Conference was debarred from dealing with the matter.[3]

This unsuccessful attempt at revision also brought to light a more substantial procedural difficulty. The Conference had before it at the same time a British proposal to exclude from the scope of the Convention women occupying posts of supervision and management, and a Belgian proposal to insert a provision authorizing Members to substitute 11 p.m. to 6 a.m. for 10 p.m. to 5 a.m.

---

[1] *International Labour Conference, Fifteenth Session, Geneva 1931. Report III, Partial Revision of the Convention concerning employment of women during the night*, and *Final Record*, Vol. I, pp. 322–37, 341–59, 474–9, 718–34.

[2] *International Labour Conference, Sixteenth Session, Geneva 1932. Report IV, Partial Revision of the Convention concerning the protection against accidents of workers engaged in loading or unloading ships*, and *Record of Proceedings*, pp. 300–13, 326–30, and 781–832.

[3] *International Labour Conference, Fifteenth Session, Geneva 1931. Final Record*, Vol. I at p. 478. The difficulty did not recur in 1932 when the Protection against Accidents (Dockers) Convention was under revision, since the original text of this Convention included the revised standard articles, and the Governing Body has avoided it in the case of the Workmen's Compensation (Industrial Diseases) Convention, 1925, revision of which is now proposed, by including among the points placed upon the agenda of the Conference the insertion of the revised standard articles.

as the period during which night work is absolutely prohibited. Each of these proposals was approved separately by a small majority when the Conference adopted the report of the Committee which had discussed them, but the text submitted by the Drafting Committee, in which both were incorporated in the manner required by the Standing Orders, failed to secure the two-thirds majority necessary at a final vote for the adoption of a Convention.[1] It would be idle to speculate as to how far in this case either proposal was assisted or prejudiced at the final vote by its association with the other, but it is clear that the linking together of unconnected proposals in this way is liable to make impossible modifications of a Convention which are generally admitted to be desirable. The difficulty does not arise in conferences which have no rigid procedure, but is a real one in the case of the International Labour Conference with its fixed rules of procedure and statutory requirement of a two-thirds majority for the adoption of a Convention. It might be overcome by an amendment to the Standing Orders providing that, in the event of a revising Convention not securing the required majority at a final vote, the Conference may decide, perhaps by a two-thirds majority, to discard some of the proposals which are before it and take a further final vote on a text revised in fewer respects. The modalities of such a procedure would require attentive consideration and there could be no question of recourse to it being automatic in the event of a revising Convention not being adopted. In cases in which all the proposals before the Conference are interdependent, or in which they are considered to be so by a considerable proportion of the Conference, rejection of the whole must imply the rejection of all its parts. But whenever there have been under discussion two or more unrelated proposals, the adoption of some of which without the others would make revision worth while, some such procedure would be useful. The danger of opposition to the irrelevant leading to the rejection of the essential is admittedly present in all legislative procedure, national or international, but whereas comparatively simple procedural innovations cannot be a universal solution of the difficulty, they can be of assistance when a Convention is only subject to revision by a somewhat formal procedure and on a limited number of points.

A more formal *lacuna* in the procedure has been disclosed by the revision of the Protection against Accidents (Dockers) Convention. With a view to facilitating ratification by Great Britain and Germany, the revision of this Convention was placed upon the agenda of the Conference before it had come into force, the Governing Body being competent to propose revision at any time in virtue of its general power under Article 400 of Part XIII to place upon the agenda of the Conference any topic which it deems fit. For such a case the Standing Orders of the Governing Body make no provision, Article 7 (*a*), which defines the procedure for placing the revision of a Convention on the agenda of the Conference, only applying to cases in which the Governing Body, acting under the terms of a Convention, has to present a report upon its working and to consider the desirability of revision. It was, therefore, decided to apply this article by analogy in so far as possible. The difficulty has recurred in connexion with the proposed revision of the Workmen's Compensation (Industrial Diseases) Convention, 1925, which came into force on April 1, 1927. This Convention is now in force between twenty Members, and since revision with a view to the extension of its scope has been thought desirable before the presentation of a decennial report is due, the method of applying by analogy Article 7 (*a*) of the Standing Orders of the Governing Body has again been followed. No serious inconvenience appears to have resulted in either case, and no difficulty arises at the Conference stage of the procedure since Article 6 (*a*) of the Standing Orders of the Conference applies to any case in which the revision of a Convention is upon its agenda; but the existence in the Standing Orders of the Governing Body of regular provision for such cases would help to remove the misconception which still exists in some quarters that International Labour Conventions are only open to revision at the ten-yearly intervals at which the Governing Body is required by their terms to consider as a matter of routine whether revision is necessary.

---

[1] For the details of the procedure see Article 405 of Part XIII and Article 6 (*a*) of the Standing Orders of the International Labour Conference.

If the experience now available suggests the above reflections upon the adequacy of the present Standing Orders of the Governing Body and the Conference, it also suggests certain comments upon the suitability for insertion in all Conventions of the form of revision articles approved by the Conference in 1929. These articles, though normally inserted in Conventions in a common form, have already been shown capable of a certain degree of adaptation to specialized requirements. When the Conference had before it the Hours of Work (Coal Mines) Convention, 1931, it wished to ensure that a limited number of points would receive particularly early reconsideration and prefaced the common form revision articles with a clause requiring the Governing Body to place on the agenda of the Conference within three years from the coming into force of the Convention its partial revision on four points.[1] The obligation here imposed upon the Governing Body is to be contrasted with the discretion left to it by the common form articles; and in any future case in which some interest in the Conference is only prepared to accept certain parts of a Convention as a provisional settlement this clause may be considered a suggestive precedent.

Other adaptations would be possible without abandoning the essential features of the present procedure. There may be cases in which it may not be desirable that the coming into force of a revising Convention should close to further ratifications the original Convention. The advantages of the progressive substitution of one Convention for another have always to be balanced against those of securing the ratification of an unrevised Convention rather than of no Convention at all. Progressive substitution has decisive advantages in cases in which international uniformity is the object in view and the two Conventions contain incompatible provisions. The Protection against Accidents (Dockers) Convention is a case in point. The whole object of this Convention is to secure international uniformity in the application of certain technical regulations. On a number of points, some of which are of considerable importance, the revised and unrevised texts are in direct conflict. Here it is clearly desirable that the old Convention should not be open to further ratification. Where the revised and unrevised texts are not in direct conflict, the one being simply an extension of the other to cover new cases, the balance of advantage would appear to lie the other way. The proposed revision of the Workmen's Compensation (Industrial Diseases) Convention is a convenient illustration of this type of case. The Conference is to be asked to add to the list of compensable diseases named in the schedule to Article 2 of this Convention. It may be that after the coming into force of a revising Convention there will be Members prepared to undertake an international obligation to compensate the diseases named in the original schedule, but not prepared to engage themselves internationally to compensate silicosis or some other disease included in the revised schedule. This will at present continue to be possible, the existing Convention not including the new form of revision article, but should the Conference at some future date adopt a second revising Convention making further additions to the list of compensable diseases, a Member not yet bound by any international obligation will no longer, unless the revising Convention now contemplated includes a modified form of revision article, have the same freedom, and though at liberty to ratify either the original Convention or the second revision will not be entitled to ratify the intermediate revision. If it is desired to meet such cases, the present rules must be made somewhat more flexible. Some modification of them may also seem desirable when reciprocity Conventions are under revision. There is at present one such Convention, the Equality of Treatment (Accidents) Convention, 1925, each Member ratifying which undertakes to grant to the nationals of any other Member which has ratified national treatment in respect of workmen's compensation for industrial accidents happening in its territory. In the event of such a Convention being revised, the rule that ratification of the revising Convention involves denunciation of its predecessor, which is not necessarily applicable in this particular case since the Equality of Treatment Convention does not include the present revision article, may lead to great inconvenience. Where this rule applies, a Member ratifying a revising Convention would forfeit the benefits enjoyed by its nationals under the earlier Convention in the territory of any Member not prepared to ratify the new one. Such a result is hardly desirable, whether the result of the revision has been to substitute something for the old text or merely to amplify it. In neither case is it either legally or practically impossible for a Member to comply simultaneously with the two Conventions. If a maximum of results is to be achieved Members should be allowed to be parties to both and to accord to each other the facilities which they receive in return, it being understood that the revised Convention applies as between all Members which are parties to it. This possibility of being parties to both Conventions might be combined with either the acceptance or the prohibition of new ratifications of the original Convention, and which of these alternatives is desirable will depend in each case upon the subject-matter of the Convention and the nature of the revision which has been effected. For all such cases adequate provision can best be made by including in future Conventions a modified revision article so drafted as to give the Conference power, when adopting a revising Convention, to decide in each case, with due regard to the nature of the revision which it has effected, whether the old Convention shall remain open to further ratification or whether it shall be automatically denounced by the ratification of the revising Convention. In this, as in other spheres, the dangers of excessive rigidity can only be overcome by conferring a broader discretion upon international bodies.[1]

---

[1] Article 21.

There are other types of case for which a procedure entirely different from that defined in the present Standing Orders and revision standard articles would seem necessary. Articles granting privileged treatment to certain countries in the manner contemplated by Article 405, paragraph 3, of Part XIII are a convenient illustration. This paragraph provides that

> "In framing any Recommendation or Draft Convention of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries."

Without frequent recourse to such a procedure it is impossible to expect International Labour Conventions to give an effective stimulus to social progress in countries of backward industrial development, but, despite that, the Conference has rarely acted on this injunction and proposals for such action have tended to rouse lively controversy. The workers' delegates of countries for which special treatment has been claimed by their Governments have been inclined to combat such claims with some vigour.[2] They have felt that the existence of special treatment articles would handicap those who wish, in domestic politics, to urge more far-reaching reforms. This is clearly a very real danger. The grant of special treatment in an International Convention may give a certain prestige to half-measures of reform and have a positively harmful influence once the device has outlived its usefulness during a transitional period. During such a period special treatment may nevertheless be essential if anything is to be achieved in such countries by international action. It would appear that the difficulty could best be met by the existence of some procedure for the reconsideration of such articles at frequent intervals. The existing procedure of revision is ill adapted for this purpose, since it implies the adoption of a new Convention requiring fresh ratifications by all Members to be bound by it. The germ of a more suitable substitute is perhaps to be found in Article 9 (5) of the Minimum Age (Non-Industrial Employment) Convention, 1931. The article in question accords special treatment to India, and clause 5 provides that

---

[1] There are precedents for giving international conferences power to determine when revising a convention the effect of the new convention upon the old. Thus Article 27 of the Convention on Certain Questions relating to the Conflict of Nationality Laws, The Hague, April 12, 1930, provides as follows in para. 2: "The High Contracting Parties agree that, if the present Convention is revised, the revised Convention may provide that upon its entry into force some or all of the provisions of the present Convention shall be abrogated in respect of all the Parties to the present Convention."

[2] See particularly *International Labour Conference, First Annual Meeting, Final Record* at pp. 92–6 and 98, 158–61 and 162–6, and *International Labour Conference, Sixteenth Session, Geneva 1932, Record of Proceedings*, pp. 402–17, 472–6, 750–1, and 776–7.

> "the competent authority shall, after a period of five years from the date of passing of legislation giving effect to the provisions of this Convention, review the whole position with a view to increasing the minimum age prescribed in this Convention, such review to cover the whole of the provisions of this article."

The development of this provision for a review of the position by the Government affected into a provision for the substitution by the Conference with the consent of that Government of a more exacting international engagement would seem to be the most appropriate method of providing for the gradual stiffening of special treatment articles.

The procedure of revision is also cumbrous as a method of making minor amendments in Conventions containing an abundance of technical detail. Apart from the danger of ratifications being prevented by comparatively trifling points, Conventions such as the Protection against Accidents (Dockers) Conventions, 1929–32, contain numerous detailed requirements which technical progress may make it desirable to modify from time to time. The invention of new safety devices may make superfluous some of the precautions required by such a Convention, or the invention of new machines or gear may make further regulations necessary. National legislatures, preoccupied with the same problem of allowing for the adaptation to changing conditions of the details of legislation, have found a partial solution for it by leaving such matters to be dealt with by executive regulation. There are those who argue that international conventions should be disembarrassed of detail in a similar manner and should attempt no more than the statement of broad principles, all matters of detail being referred to national laws and regulations. It will be generally admitted that there is some truth in this contention, and the point is one which all those concerned with the preparation of international legislation have constantly to bear in mind, but there are many cases for which such a method is quite unsuited. Technical details can safely be ignored by national legislatures when they raise no question of principle, and all that is essential is that some person acting on proper technical advice should formulate authoritative rules. The international legislator is in a more difficult position, since one of his primary functions is to promote uniformity between some sixty systems of national legislation, and every relegation of a question to national discretion implies its abandonment not to one authority acting with delegated power, but to a horde of such authorities all acting in different *milieux* on contradictory principles. In some contexts this is unimportant since international uniformity in matters of detail is unnecessary or perhaps undesirable. In others it is of vital import since the whole object of regulation is to attain uniformity. In these cases it becomes necessary for international Conventions, unlike national legislation, to contain an amount of technical detail which both enhances the difficulty of securing their ratification and increases the probability that certain of their provisions will require periodical modification. The possibility of introducing some procedure for amending such Conventions less elaborate than that of revision has been under consideration by the I.L.O. on two occasions, but has been examined primarily from the standpoint of facilitating ratification by Members which are nearly in a position to comply with the convention, but only prepared to do so if it can be modified on some quite minor points. The introduction of a procedure for this purpose by the insertion of an appropriate standard article in Conventions was discussed by the Conference at its third, fourth, and sixth Sessions, but it was found impossible to secure agreement on a formula sufficiently simple to represent a real improvement. The question was taken up again by the Governing Body when it decided to place the partial revision of the Protection against Accidents (Dockers) Convention upon the agenda of the Conference, but after the Conference had successfully adopted a revising Convention it was felt that further discussion of the question was premature. The question, therefore, remains among the problems of the future. Its solution should be facilitated by the fact that the modification of technical details rarely requires parliamentary approval. Postal and aerial law analogies[1] suggest

---

[3] See the provisions of the Postal and Air Navigation Conventions cited in footnotes 2 and 3 at p. 47 above. So far as Great Britain is concerned the operation of these provisions is facilitated not only by the general authority over the subject-matter of these conventions delegated to the executive by the Post Office Act and Air Navigation Act but also by express provisions conferring authority to give effect to international engagements. See Section 4 of the Post Office Act, 1908 (8 Edw. VII, c. 48) and Section 1 of the Air Navigation Act 1920, (10 & 11 Geo. V, c. 80) which in terms confers authority to give effect by Order in Council to amendments to the Convention.

that in such cases it should not be impossible to secure some relaxation of the unanimity rule.

Another case for which the existing arrangements make no provision is where it is desired to make possible the termination of a Convention at some date which cannot be estimated with any certainty when the Convention is adopted. It is improbable that the I.L.O. will often have to consider this type of case. All the earlier Labour Conventions contain an article permitting denunciation after the expiration of ten, or in some cases five, years from the date on which the Convention first comes into force, and all Conventions adopted since 1928 contain a denunciation and tacit reconduction article defining the intervals at which denunciation is permitted. The possibility of denunciation under these articles will normally afford sufficient opportunity for the termination of obligations release from which has become desirable, but the recent discussion of a possible forty-hour week Convention has suggested that there may be abnormal cases for which further provision is necessary. One school of thought advocates such a Convention as a permanent reform, another is in favour of it only as a temporary measure for the duration of the world economic crisis.[1] Before these lines are in print the International Labour Conference may have had occasion to discuss whether a temporary Convention is expedient and, if so, what provision it might contain for its abrogation, but, whatever the decision of the Conference may be on these controversial points, the episode is of more than transient interest as illustrating a new phase of the revision problem. There may be cases in which provision for early denunciation is undesirable because it would leave too wide a discretion to the individual parties to the Convention, and in which the possibility of early revision is inadequate because revision only permits of the termination of existing obligations by the acceptance of those resulting from revision which may be equally or more unacceptable to the state desiring release. For this type of case, which may prove to be hypothetical so far as Labour Conventions are concerned, the I.L.O. has not yet devised any appropriate procedure. There can be little doubt that it can be most conveniently provided for by the inclusion in any agreements affected, whether they be Labour Conventions or instruments more likely to require abrogation, of provision for their termination by some international body, either at its discretion, or if, in its judgment, certain conditions have been fulfilled. The classical precedent for such a provision is Article 8 of the Mutual Guarantee Treaty of Locarno,[1] which in its turn was inspired by Article III of the unratified Anglo-French Guarantee Treaty of 1919.[2] It would not appear impossible to adapt the Locarno formula to the differing technical characteristics of other types of international agreement. So far as Labour Conventions are concerned, the International Labour Conference could always provide for such a case by including in a Convention an article permitting its abrogation by a vote of the Conference taken by some stated majority or by a decision of some other body given authority for the purpose.

---

[1] On this question see I.L.O. publication, *Hours of Work and Unemployment, Report to the Preparatory Conference*, January 1932.

IV

Conclusions

The above survey has stressed some of the limitations of the present procedure, but when all necessary reservations have been made on this score there are three substantial advantages to be set to its credit.

(1) The working of Conventions is automatically reviewed by the Governing Body once in ten years with the object of considering whether either total or partial revision need be contemplated. Similar provision for reconsideration after a stated interval exists in various other international Conventions, but except where some body meeting at regular intervals is seised of the question as a matter of course such provisions tend to yield rather shadowy results.

(2) The Governing Body is in a position to place the revision of a Convention on the agenda of the Conference in terms which only permit of discussion upon the points specially selected for revision. There are doubtless other cases in which proposals for revision would meet with less hostility if it were known that any Conference convened to discuss them would only be competent to entertain proposals relating to points specially selected for discussion.

(3) Whatever criticisms may be possible of the present standard articles providing for revision, they do define in a quite unequivocal way the effect of the adoption of a revising Convention. In this they stand in sharp contrast to the many

---

[1] LIV *League of Nations Treaty Series*, p. 295, or Hudson, *op. cit.*, Vol. III, p. 1694.

[2] Available as schedule to 9 & 10 Geo. V, c. 34.

international Conventions which refer to the possibility of revision without defining its consequences.

It remains to consider whether the experience of the I.L.O. has any bearing upon the general problem of treaty revision. Its significance is clearly limited to the revision of multipartite Conventions of a legislative character, but within this special field it is not a little suggestive. Examination of the I.L.O.'s experience cannot but leave one with the clear conviction that any workable procedure of revision must be capable of adaptation in each case to the technical characteristics of the subject-matter of the treaty under revision. Recognition of this will clear the way for constructive effort directed towards the elaboration of specialized procedures adapted to particular types of treaty. More has already been accomplished in this sphere than is generally realized,[1] but before the technical approach to the revision problem can yield far-reaching results, two conditions, both of which are essentially political, must be fulfilled. It must become the practice to insert in all treaties provision for their modification by some procedure appropriate to their subject-matter, and where the modification of a treaty may involve changes in municipal law legislatures must show themselves willing to delegate their powers to a sufficient extent to make it possible for modifications, introduced by procedures which they have approved once and for all, to become operative without confirmatory legislation in each particular case. Delegated legislation is rarely considered from this angle, and the report of the Committee on Ministers' Powers includes no reference to international requirements as a justification for delegation.[2] It is to be hoped that the omission will be remedied in any further discussion of that controversial subject.

---

[1] Such procedures are also in course of development for treaties somewhat different in character from those discussed here. Treaties imposing a limitation of international status upon one party now frequently contain a provision for their modification by agreement between the state under disability and the Council of the League of Nations. Thus all the mandates may be modified with the consent of the Council though they confer rights upon all Members of the League. The minorities treaties and declarations and the declaration made by Irak on admission to the League of Nations are modifiable with the approval of a majority of the Council.

[2] See the review of grounds for delegation contained in Cmd. 4060 at pp. 51–3.

THE STIMSON DOCTRINE OF NON-RECOGNITION

A NOTE ON ITS LEGAL ASPECTS

By ARNOLD D. McNAIR, Reader in Public International Law in the University of Cambridge: Associé de l'Institut du Droit International

On January 7, 1932, Mr. Stimson, then American Secretary of State, sent to China and Japan an identic note containing the following passage:[1]

> "In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Government of the Chinese Republic and the Imperial Japanese Government that it cannot admit the legality[2] of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between these governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the Open Door Policy; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties."

On March 11, 1932, the Assembly of the League of Nations adopted the following Resolution, with the abstention of China (who signified her acceptance on the following day) and Japan:

> "The Assembly . . . declares that it is incumbent upon the Members of the League of Nations not to recognize any situation, treaty, or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris."

The President declared the Resolution to have been adopted unanimously, the votes of China and Japan who were parties to the dispute under consideration by the Assembly being regarded as unnecessary. With the correctness of that view and with the legal bearing of this Resolution upon the particular dispute which evoked it, this article is not concerned.

The moral and political effects of the doctrine laid down in the two sources mentioned above would, even if it stood alone and were not implemented by any changes in the system of international law, be considerable. Our aim is to consider the legal aspects of the doctrine and to attempt to answer the question whether its legal content promises anything of value to the society of states.

---

[1] The text of the Chinese and Japanese replies and of certain other cognate communications are given by Professor Quincy Wright in *American Journal of International Law*, XXVI (1932), pp. 342, 344. See also the following: Fischer Williams, "The New Doctrine of 'Recognition'", in *Transactions of Grotius Society*, Vol. XVIII (1933), pp. 109–29; Wild, "Treaty Sanctions", in *American Journal of International Law*, Vol. XXVI (1932), pp. 488, 500; Wright, "The Meaning of the Pact of Paris", *ibid.*, Vol. XXVII (1933), pp. 39–61.

[2] The aspect of "legality" is discussed by Fischer Williams, *op. cit.*, in considerable detail.

In the past the term "recognition" in international law has been used mainly in connexion with the recognition by existing states of new states, of new heads and governments of old states, and of belligerent communities.[1] In none of these cases is there any legal obligation to grant recognition; in all of them certain facts must exist before recognition may lawfully be given; granted the existence of those facts, the question whether or not recognition shall be given, is one of policy, not of law. Personally I do not find that I can derive much, if any, help from these types of recognition in endeavouring to assess the legal content of the new doctrine. If, of course, the events which it is proposed not to recognize should result in the establishment of a new state or a new government, then, while taking note of the new element which, according to the declarations quoted above, ought to influence a decision to recognize or not to recognize, one would naturally examine the past in seeking to forecast the probable future of the new doctrine. But in practice recognition or refusal to recognize has not been confined to cases of new states or new governments of old states. Recognition has frequently been sought by a state which has acquired by occupation or annexation some new piece of territory, particularly colonial territory, in the belief that the grant of recognition by important states will strengthen its title to the newly acquired territory. The requirement of the notification of the acquisition of new territory which is prescribed by the General Act of the Berlin Conference of 1884–5 was probably inspired by some such belief. This kind of recognition has been examined by Dr. Lindley,[2] who says that in the original draft proposed by the German and French Governments

> "the object of notification was said to be to enable other Powers to recognize the occupation as effective or to establish their objections",

although the reference to recognition was omitted in the final form of the Act. He concludes:

> "Although the mere assent or dissent of other states does not in law affect

---

[1] Some writers, e.g. Lawrence, *Principles of International Law*, § 142, would add insurgents.

[2] *Acquisition and Government of Backward Territory*, ch. xxix, "Notification, and the Assent of other States", p. 300.

the goodness of an otherwise valid title, it may be of considerable moment politically and diplomatically. In some cases, so effective has been the dissent of other Powers that an agreement made between two states with reference to a territorial title has been set aside on account of it."

It would seem that recognition of this type is akin to estoppel, while a refusal of recognition is akin to a protest,[1] an essentially negative conception.

According to the Stimson doctrine a "situation, treaty, or agreement" becomes objectionable and ought not to be "recognized" when it is "brought about by means contrary to the Covenant of the League or to the Pact of Paris". Mr. Stimson, as in private duty bound, omits the Covenant; the Assembly for the same reason includes it. What then are "the means contrary to" these instruments which cause the doctrine to apply?

They would seem to be as follows:

A. From the Covenant:

(i) the possession of armaments, without the concurrence of the Council, in excess of the limits formulated by the Council and adopted by the several governments (Article 8). (No such limits have yet been adopted, and it is doubtful whether a breach of this obligation, when it arises, could be described as a 'means');

(ii) external aggression (Article 10);

(iii) resort to war until the expiry of three months after an award or judicial decision or a report by the Council (Article 12);

(iv) resort to war against a Member complying with an award or decision (Article 13 (4));

(v) resort to war against a party to a dispute which complies with the recommendations of a report by the Council (Article 15 (6)).

B. From the Pact of Paris:

(i) war used as an instrument of national policy;

(ii) war or any other "non-pacific" means used for the solution of an international dispute. Some light is thrown upon these words by a paragraph of the preamble:

> "Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty . . ."

As a gloss upon the "means" enumerated above we may add an expression used by Mr. Stimson on February 24, 1932, in an official communication addressed to Senator Borah as Chairman of the Foreign Relations Committee of the Senate.[1] Mr. Stimson, referring to his Note of January 7, 1932, said,

---

[1] "A protest serves the purpose of a preservation of existing rights, or of making it known that the protesting state does not acquiesce in, and does not recognize, certain acts." Oppenheim, *International Law* (4th ed.), Vol. I, § 489.

> "if a similar decision should be reached and a similar position taken by the other governments of the world, a caveat will be placed upon such action which we believe will effectively bar the legality hereafter of any title or right sought to be obtained by pressure or treaty violation . . ."

It would be pedantic to construe the language either of Mr. Stimson's Notes or of the Assembly's Resolution in the manner appropriate to the construction of a treaty or statute, and, therefore, it matters little for our present purpose that both the Covenant and the Kellogg Pact, the use of "means contrary" to which brings the new doctrine into play, unhappily employ the technical term "war"[2] instead of the wider and non-technical term "armed force" (*la force armée*) used in Hague Convention II "respecting the Limitation of the Employment of Force for the Recovery of Contract Debts"; though the Kellogg Pact goes far to repair this defect by means of the references in its preamble and its second article to "pacific means" and "a peaceful and orderly process". The hampering results of defective terminology upon the actual application of the Covenant became obvious in the Corfu affair of 1923 and again in the pending Sino-Japanese affair. But the Stimson Note and the Assembly Resolution now under consideration are happily not restricted by such limitations and present us with the stark problem: What is the international community going to do when faced with the use by one of its members of *force*, applied or threatened, in order to attain its own ends? Can it do anything by refusing to "recognize" the forbidden fruits thereby obtained?

The variety of situations which in the past have been and in the future may be produced by force, applied or threatened, is inexhaustible. Let us consider a few of them.

(*a*) *New Governments of old States.* In the first place, I think we may exclude situations produced by force within a state, such as revolutionary changes of government. The governments of other states are called upon in these circumstances to make up their minds whether or not to recognize the new revolutionary government, and their decision to grant or to withhold recognition may or may not have important effects according to the political and economic importance or the geographical proximity of those other states. Thus in the case of revolutions in Central American States the attitude of the United States of America is of great importance, but the non-recognition by the United States of the Russian Sovietic Government for a space of fifteen years does not seem to have mattered much.

---

[1] Cited by Fischer Williams in *Transactions of the Grotius Society*, *loc. cit.*

[2] See "The Legal Meaning of War" in *Transactions of the Grotius Society*, Vol. XI (1926), pp. 29–51; Brierly, "International Law and Resort to Armed Force" in *Cambridge Law Journal*, Vol. IV (1932), pp. 308–19, and Fischer Williams, *ibid.*, Vol. V (1933), pp. 1–21.

(*b*) *New States.* In the second place, let us take the case where force, whether internal or external, has produced a new community which seeks recognition from other states. The instantaneous recognition granted by the United States in November 1903 to the new Republic of Panama, which arose out of a revolutionary secession from the Republic of Colombia, and the Treaty of Guarantee between the United States and Panama of November 18, 1903, were probably decisive of the continued existence of the new state. But recognition alone would not have produced that result. Colombia would have committed no international wrong against the United States by suppressing the rebellion. It was the fact, so one may surmise, that she knew she would have to reckon with the United States that deterred her from any prolonged attempt to do so. As Professor Hyde says,[1]

> "the acts of intervention [by the United States] took the form of the prevention of the landing of armed forces on the Isthmus, the bombardment of the town of Panama, and the recognition of Panama as a state."

Again, the recognition in 1830 by Great Britain, France, Austria, Prussia, and Russia of the Provisional Government of Belgium a few weeks after the revolt from Holland was soon followed by the Treaty of Guarantee of 1831, though Holland did not finally acquiesce until 1839.

In these and similar cases recognition was accompanied by further and more concrete evidence of support. On the other hand, many cases have occurred in which a mere protest against a change made in violation of a treaty and a declaration of intention not to recognize that change have in no way availed to prevent the change. On October 6, 1908, when Bulgaria, established as "an autonomous and tributary Principality under the suzerainty of His Imperial Majesty the Sultan" by the Treaty of Berlin of 1878, suddenly proclaimed her independence, the

---

[1] *International Law*, Vol. I, § 82.

British Government addressed to her a note[1] in which it was said that:

> "We cannot admit the right of any Power to alter an international Treaty without the consent of the contracting parties. His Majesty's Government cannot, therefore, recognize what has been done until the views of the other Powers are known, especially of Turkey, who is more concerned than any one else."

This protest did not, however, prevent the independence of Bulgaria from becoming an accomplished fact. Nor again was Great Britain able to maintain her protest[2] against the annexation by Austria-Hungary of Bosnia and Herzegovina in 1908 in open violation of the Treaty of Berlin of 1878. On the other hand, when Russia in 1878 by her Treaty of San Stefano with Turkey was prepared to violate the Treaty of Paris of 1856, some at any rate of the protesting Powers were prepared to take joint action to enforce their protest, and it was effective.

(*c*) *Annexation of Territory.*[3] Some light upon the consequences of the "non-recognition" of the acquisition by one state of the territory of another by means which to-day would be regarded as contrary to the Covenant and the Kellogg Pact is shed by the desire of an annexing state to secure in advance the acquiescence or the indifference of states which might be expected to raise objection.

The latest volume, No. viii,[4] of *British Documents on the Origins of the War, 1898–1914,* edited by Dr. Gooch and Professor Temperley with the assistance of Dr. Penson, shows Japan anxious to secure the support of her ally, Great Britain, for her pending annexation of Corea in 1910, and Great Britain anxious to avert any resulting prejudice to the interests of her nationals in Corea before giving that support.[5] It is interesting to note that in consideration of the British acquiescence in the annexation Japan was induced to give certain undertakings which may be summarized as follows:

(*a*) "Treaties hitherto concluded by Corea with foreign Powers ceasing to be operative, Japan's existing treaties will, so far as applicable, be applied to Corea. Foreigners resident in Corea will, so far as conditions permit, enjoy the same rights and immunities as in Japan proper, and the protection of their legally acquired rights subject in all cases to the jurisdiction of Japan . . ."

---

[1] See Gooch and Temperley, *British Documents on the Origins of the War, 1898–1914,* Vol. V, p. 398.

[2] *Ibid.*, p. 390.

[3] The case of Bosnia and Herzegovina has already been mentioned.

[4] pp. 487–502.

[5] Apart from the fact that Great Britain was Japan's ally and that treaties between Great Britain and Corea existed, I am not aware that Great Britain had any special *locus standi* in the matter or right to object.

(*b*) That for ten years the schedules of export and import duties and shipping tonnage dues then prevailing in Corea should continue.

(*c*) Permission for ten years for "vessels under flags of the Powers having treaties with Japan to engage in the coasting trade between the open ports of Corea and between those ports and any open port of Japan".

(*d*) That the existing open ports of Corea (with one exception and one addition) should remain open.

In addition Japan undertook "once the Annexation was safely over" to negotiate with Great Britain regarding certain other matters affecting her subjects, namely, "the right to hold land and own mines, the disposal of the foreign settlements, questions relating to the jurisdiction of the Courts in Corea, also in connexion with Corean prisons, which were not suitable for foreign offenders".

The Corean episode is instructive because it shows the kind of safeguards and advantages which other states are likely to seek to obtain as the price of recognition and likely to fail to obtain in the event of non-recognition.

The conclusion which we are inclined to draw from these instances is that when a new situation has been produced by force or in violation of a treaty, non-recognition alone not followed by action is a policy of very limited value and effect. Further, it is submitted that this view is true even when it is remembered that past instances of protest and refusal to recognize have usually been made by one or two Powers, whereas the policy now under consideration postulates the concurrence of the whole or the main part of the international community.

The benefits which accrue to a state annexing territory from the active recognition or passive indifference of other states are plain. The expression of approval or the absence of protest tends to confirm her title. Her newly acquired subjects will usually become entitled to the treaty privileges which her existing subjects enjoy. The manufacturing and the shipping interests of the newly acquired territory will usually receive the same treatment from foreign states as those of the annexing state, and generally the newly acquired territory and its inhabitants will enter into the enjoyment of the same international benefits as are enjoyed by the territory and the inhabitants of the annexing state.

What then are the disadvantages which will result to the annexing state and its newly acquired territory from non-recognition, and are those disadvantages greater than those which will result to the states which withhold recognition?

Let us examine them under the following headings.

(1) *Commercial Treaties.* Suppose that a non-recognizing state declines to regard commercial treaties with the annexing state as applicable to the newly annexed territory. The inhabitants of that territory will be denied the benefits of those treaties and their commerce will to that extent be restricted. *Per contra,* the commerce of the non-recognizing state will be similarly restricted. Theoretically it is perhaps conceivable that commerce might continue on the basis of any former commercial treaties applicable to the annexed territory, but that is unlikely when the territory is no longer under the control of the government which made the treaties.

(2) *Extradition Treaties.* Similarly a refusal by a non-recognizing state to regard extradition treaties with the annexing state as applicable to the newly annexed territory merely means that the non-recognizing state will not extradite to the annexing state fugitive criminals alleged to have committed crimes on the newly annexed territory, and will not demand from the annexing state alleged criminals who have found refuge on that territory. The only persons likely to benefit are the alleged criminals.

(3) *Diplomatic Protection.* It is the view of some authorities that "the act of soliciting and receiving from the government of a certain country an exequatur for a consular officer at a particular place is not a conclusive recognition of such country's sovereignty over the place in question".[1] Certainly consuls have frequently remained at their posts and exercised some of their functions during revolutions and changes of *de facto* sovereignty without involving their governments in recognition of the new government or state claiming to exercise authority over the territory involved. In this way a very limited amount of protection for the nationals of a non-recognizing state might be possible, but such a situation could only be temporary, and in cases of serious injury to the persons or the property of those nationals it seems inevitable that the non-recognizing state would be driven to make applica-

---

[1] Mr. Rives, American Acting Secretary of State, cited by Moore, *Digest of International Law,* Vol. V, p. 13; approved by Hyde, *International Law,* Vol. I, § 462; so also Hall, *International Law* (8th ed.), § 105; see, however, Oppenheim, *International Law* (4th ed.), Vol. I, § 428. See *The Times* newspaper of May 17, 1933, for a case of temporary asylum granted in a British consulate in Manchukuo.

tion to the government in fact exercising authority in the territory in question. For instance, if to-day a British subject were kidnapped by bandits—I mean, real bandits—near Mukden, it would not help him much if the British Government made representations to the Chinese Government and requested from them energetic action to procure his release.

(4) *Protection of Industrial, Literary, and Artistic Property.* A certain amount of loss and inconvenience might fall upon the inhabitants of the territory in question if the new state claiming to exist upon that territory were refused admission to the International Unions which have been established for the protection of property of these kinds, or if the state claiming to have incorporated the territory were denied the benefits of these Unions in relation to that territory. But the fact that already certain states exist which have not found it necessary to join these Unions suggests that membership of them is not an essential.[1]

(5) *Generally.* It would seem that, when a state annexing territory is met with a protest or declaration of non-recognition by other states, it cannot claim from those states in respect of that territory the benefits of any guarantee such as Article 10 of the Covenant (a security standing very much below par at the moment)[2] or the application of the less definite implications of the Kellogg Pact.

Conclusion. I wish to disclaim any attempt to depreciate the political consequences of non-recognition, that is, the degree of embarrassment which can be caused to a wrongdoer if the *major et sanior pars* of the international community decides as a matter of world policy not to recognize the results of the wrongdoing. That embarrassment may be considerable and I do not wish to underrate its effects. When, however, we turn to inquire in what way the merely negative policy of non-recognition can produce concrete legal consequences which will deter the wrongdoer, I think the answer must be a disappointing one. It is difficult to see how such a policy can do more harm to the wrongdoing state than to the non-recognizing states. When the wrongdoing involves breaches of treaties such as the Covenant of the League and the Kellogg Pact, a policy of non-recognition of the consequences of the wrongdoing is the minimum which considerations of international decency require. But it is idle to think that mere non-recognition will solve the problem and operate as an adequate sanction. As a prelude to concerted international action against a wrongdoer whatever form it may take—complete economic boycott of its trade, exclusion of its ships and its nationals from other countries, rupture of diplomatic relations, and so forth—a policy of non-recognition may in certain circumstances act as a deterrent. But there is a danger of its becoming a slogan which will serve as an excuse for thinking that an effective method of preventing breaches of international order has been discovered and that no further action is required beyond a declaration of non-recognition.

---

[1] In *The Times* newspaper of January 16, 1932, it was stated that "although Manchukuo is not yet a member of the Postal Union, it is understood that the matter of accepting Manchukuo mail-bags for international transit has been arranged".

[2] As has been pointed out by others, when the Assembly of the League resolves not to recognize a treaty, it would seem to follow that the treaty would be denied registration under Article 18 of the Covenant.

AN INTERNATIONAL CODE OF THE LAW OF SALE

By H. C. GUTTERIDGE, K.C., LL.D.

The Problems arising from Conflict of the Laws of Sale

THE gradual drifting away of commercial litigation from the courts into the hands of commercial arbitrators has been commented on frequently both in this country and abroad.[1] This tendency, which reaches its apex in the domain of the law of sale of goods, has been attributed to a great variety of causes, some of them procedural, such as the expense and delay of legal proceedings. But in the case of disputes arising out of international trade it can hardly be doubted that one of the main factors at work is the uncertainty of the law, or it would perhaps be more correct to say—the conflict of laws—which so often arises when goods pass through several hands before they reach the ultimate buyer.

There are three possible remedies for this form of legal malaise. The first consists in a boycott of the courts of law, coupled with the compulsory employment of standard forms of contract containing arbitration clauses. This is the expedient which has been widely adopted by some of the great Trade Societies, such as the London Corn Trade Association. The standard contract in such cases represents an attempt to incorporate all necessary rules in the contract itself and, with the aid of arbitration clauses, to exclude the operation of all the legal systems which may be concerned in a transaction. But the individual merchant, who is not a member of a trade association, does not as a rule make use of these forms, and it must be assumed, therefore, that there are a very large number of international transactions which fall outside the scope of the standard contracts.

The second remedy is an international codification of the rules of Private International Law which regulate the choice of law in case of conflict. Two attempts are being made at the present time with this end in view. The Diplomatic Conference on Private International Law, which is meeting at The Hague under the auspices of the Government of the Netherlands, has entrusted the problem of unification of the rules of conflict relating to Sale to a sub-committee. A certain amount of progress has been made, but a tendency to subordinate practical issues to purely theoretical considerations renders it somewhat doubtful whether the labours of the sub-committee will be crowned with success. The peculiar difficulties which attach in general to any attempt to unify the rules of Private International Law are strikingly illustrated by the very meagre results which have so far been achieved by the Diplomatic Conference. The International Law Association, in conjunction with the International Chamber of Commerce, is also working at the same problem on parallel lines. If agreement can be reached between the interests concerned, a set of voluntary rules will thus come into existence which can be adopted by contracting parties in the same way as the York-Antwerp rules, and will be available either if the Diplomatic Conference should fail to achieve its object, or if the draft Code prepared by that body should not be accepted generally.

---

[1] See, for instance, the remarks of Scrutton L.J. in *Hillas & Co.* v. *Arcos Ltd.*, [1931] 36 Com. Cas. 534, and cf. Rabel "Die Arbeiten zur Vereinheitlichung des Kaufrechts", *Jahresbericht der Juristischen Gesellschaft*, Berlin, 1931; Ishisaki, *Le Droit Corporatif de la Vente de Soie.*

The third remedy is to remove the possibility of conflict by means of the unification of the Law of Sale throughout the civilized world. Unification of law, as a whole, is, no doubt, a dream, and may be as impossible of achievement as any proposal for the adoption of a universal language or a universal religion. But there are certain branches of private law, such as commercial or maritime law, which do not seem to present any inherent obstacle to the framing of an international uniform law.

Lord Justice Kennedy, writing nearly thirty years ago, expressed the opinion that the times were then ripe for some measure of unification of the mercantile and maritime laws of the civilized world. To quote his own words:

> "Swift inter-communication, the facility of frequent intercourse, and the ceaseless interweaving everywhere of the diverse and tenacious threads of commercial enterprise have taught the workers of the western world, not merely the error of much of their old unreasoning and undiscriminating mistrust of all foreign institutions, but its costliness. They have come to see the gain, both direct and indirect, moral and material, which would ensue if the machinery of these foreign institutions and of their own could be brought into smoother and more harmonious co-operation."[1]

Some progress has, admittedly, been made since Lord Justice Kennedy wrote in 1904. It is most apparent in the domain of maritime law,[2] but the advance in other directions is by no means negligible. The law of carriage by rail has been unified to a large extent on the Continent by the Berne Conventions of 1924. The draft Uniform Laws of Bills of Exchange and Cheques, which are the offspring of the Conferences held at Geneva in 1930 and 1931, seem to be likely to result in a very substantial degree of unification so far as the continental systems of law are concerned.[1] The movement for the removal of impediments to commercial intercourse which arise from procedural differences is also gaining strength, but is taking the form of the conclusion of bilateral conventions rather than that of unification.[2] In these circumstances it is only natural that attention should be directed to the possibility of removing the differences which exist at present between the laws governing the sale of goods in the different civilized countries. Buying and selling are the essential elements of international commerce. Carriage, insurance, and finance are after all only ancillary to the main purpose of the interchange of goods. The inconvenience resulting from conflict between different rules of law relating to Sales is so manifest that no effort can be regarded as wasted which has as its aim the bringing into harmony of the divergent rules on the matter.

---

[1] *Journal of the Society of Comparative Legislation*, Vol. XIII (N.S.), at p. 106.

[2] e.g. the Diplomatic Conventions now embodied in the Maritime Law (Conventions) Act, 1911; Merchant Shipping (Safety and Load Line Conventions) Act, 1932. Mention may also be made of the York-Antwerp Rules, 1924, notwithstanding their voluntary character. The results anticipated from the Hague Rules of 1921 and the Brussels

I. *The Problem of Unification*

Unification presents a problem which cannot be approached without a certain degree of misgiving. It has always proved to be a matter of the greatest difficulty even within the relatively narrow circle of commercial law, and the difficulties are greatly enhanced if the elements to be fused include the rules of Anglo-American law. In that event we have to deal not only with divergences in substantive or material law, but also with certain serious questions of a quasi-procedural nature. These are chiefly encountered when it becomes necessary to consider remedies for breach of contract. Continental lawyers think, as a rule, of

---

Convention of 1923 have only been realized in part, but there are grounds for the hope that uniformity will be attained before long on the question of the carrier's liability for negligence in respect of cargo.

[1] The Conventions introducing these laws have been ratified by Austria, Belgium, Denmark, Finland, Germany, Italy, Japan, The Netherlands, Norway, Sweden, and Switzerland. (Suppl. No. 2, *Chronology of International Treaties and Legislative Measures*, December 15, 1932.) Great Britain has also ratified the Convention relating to Stamp Duties on Cheques.

[2] See, for instance, the numerous conventions entered into by Great Britain relating to the service of process abroad, and cf. the Report of the Foreign Judgments (Reciprocal Enforcement) Committee, 1932. *Cmd.* 4213.

specific performance as the normal remedy for the breach by the seller of his obligation to deliver the goods, whereas in our system it is regarded as a matter which can be put right by an award of pecuniary damages. The Continental systems of law adhere to the Romanistic requirement of *interpellation* as a condition precedent to a right of action for non-delivery, and this is in sharp contrast to the Anglo-American view that the breach gives the aggrieved party an immediate right to sue for damages. Moreover, the methods of getting at the facts of a dispute and the rules of evidence are very dissimilar, and damages are measured differently in each of the two systems. Even greater difficulties arise from certain other considerations which are extrinsic to the purely legal aspect of the problem. We are confronted by the undoubted disinclination of English lawyers and merchants to accept any measure which would involve the supersession or modification of the Sale of Goods Act, 1893. This can, perhaps, be overcome, but it would be impossible for Great Britain to become a party to the enactment of any international code which was not also accepted by the British Commonwealth of Nations as a whole, and by the United States. It is unthinkable that the very substantial degree of uniformity which has been achieved by the British Sale of Goods Act and the American Uniform Law of Sale should be jeopardized by isolated action on the part of this country.

But if we disregard what may, perhaps, be termed the political aspect of the situation, there is no reason to think that unification is inherently impossible. The differences of rule which exist between the Continental and the Anglo-American systems of the law of sale of goods are frequently more apparent than real, because in both cases an identical solution is often reached, though the path which has been followed is not always the same. Even where there is a fundamental difference of rule the gulf can be bridged over, in many instances, if the parties concerned will refrain from any display of national *amour propre*. If they are willing to avoid insistence on points of legal technique, and to abandon homogeneity in the interests of substantial uniformity, a great many of the difficulties will tend to disappear.

The Sale of Goods Act, 1893: Reference has already been made to the opposition which will probably be encountered by any proposals which would affect the integrity of the Sale of Goods Act, 1893. It is impossible not to feel some sympathy with this attitude, because it rests on a more solid foundation than mere unreasoning prejudice. The Act has in most respects given entire satisfaction. It is a modern statute which is not open to the charge of obsolescence which is sometimes levelled at other codified rules of the same type, such, for instance, as the relevant articles of the French *Code Civil.* A substantial portion of it has been embodied in the American Uniform Law of Sale. It is designed to meet the requirements of traders and not those of landowners. With certain important exceptions its language may be said to be reasonably plain. Englishmen in the mass are still firmly convinced of the superiority of their laws and their legal institutions, however much they may grumble at the delay and expense involved in litigation. If arguments of a doctrinal character are addressed to them they will fall on deaf ears, and any scheme for unification will fail unless John Bull can be convinced that there are sound reasons of a practical nature for a change in his existing law. It may also be desirable to reckon with the apathy of the great trade organizations which are sheltered behind their standard forms of contract. It may even be necessary to count on their hostility, as they are disposed to regard any measures for the reform of commercial law as the thin end of a wedge which is to be employed to oust them from the position of independence of government control which they enjoy at present.

It would, however, be a gross example of legal ultramontanism if the attitude is adopted that the rules of the Sale of Goods Act represent the acme of perfection. Section 4 of the Act, which deals with formalities, has produced a crop of legal subtleties which are distasteful to men of business. The distinction drawn in Section 11 between conditions and warranties in a contract of sale represents a concept which merely exists to a very large extent on paper. It is only of very slight practical importance in the case of the sale of specific goods, and plays little or no part in connexion with sales of goods in bulk. An examination of the case law since 1893 shows that if a term in a contract of sale is treated as being of importance it is regarded in the overwhelming majority of instances as a condition and not as a warranty. In practice, though not in theory, we have thus reached the same conclusion as that which has been embodied in Section 12 of the American Uniform Law of Sale.[1] Then again, what is it that we really mean when we say that goods must be merchantable? No statutory definition of this term exists, and the judicial decisions which seek to explain it are not altogether clear or convincing.[1] Market Overt is an interesting and picturesque survival of the past which flourishes in the atmosphere of the lecture-room but has little practical importance and might well be laid away in the lumber-room of the law. Section 18 of the Act, which deals with the rules for the passing of property, has been criticized by Chalmers himself, and these rules function very badly in the case of sales on C.I.F. terms.[2] Moreover, the rule which establishes coincidence between the passing of property and the passing of the risk in the goods seems to call for reconsideration in view of the fact that the question whether a trader bears the risk or not is infinitely more important to him in practice than the passing of the property, and the two concepts have proved to be uneasy bedfellows. It would seem that the passing of risk might well form the subject-matter of a separate rule which would be free from all the perplexities which surround the transfer of the legal ownership in goods.[3]

---

[1] See Sir Mackenzie Chalmers's criticisms of the terms "condition" and "warranty" in *The Sale of Goods Act, 1893* (11th ed.), at pp. 202 *et seq.* Cf. also McCurdy, *Journal of Comparative Legislation* (3rd Ser.), Vol. IX, at p. 25.

It is submitted, therefore, that the undoubted merits of the Sale of Goods Act, 1893, do not in themselves furnish a convincing argument against the participation of Great Britain in a movement for international codification. In any event it is a matter for serious consideration whether an effort should not be made to explore the possibility of removing such differences as exist between the Sale of Goods Act and the American Uniform Law of Sale. A more extensive plan of unification would require the concurrence of the United States, but in the meantime it appears to be the duty of Great Britain, as the country in closest touch with the continent of Europe, to collaborate in existing movements for unification to such an extent—at the very least—as may be necessary to prevent any final breach of relations between the Continental and the Anglo-American systems of law and to ensure that the way may still be left open for any future attempts to secure world-wide uniformity in the law of sale.

II. *The Intervention of the League of Nations*

The initiative on the legal side of international trade relations has now passed to the League of Nations, but before the Council of the League is prepared to sponsor any scheme for unification, the question of its practicability is carefully examined. In this instance the task has been deputed to the Institute for the Unification of Private Law of Rome, which is one of the subsidiary organs of the League. The work of this Institute is not so well known in England as it deserves to be, and it is hoped that this may prove to be an excuse for a brief digression with the object of describing its constitution and its activities in outline. It was founded as an expression of a generous impulse on the part of the Italian nation which has charged itself with the housing and maintenance of the Institute as an outward and visible sign of the ideals of international fraternity and co-operation.

---

[1] See the observations of Wright J. in *Canada Atlantic Grain Co.* v. *Eilers*, 35 Com. Cas. at p. 101, and cf. the definition given by Scrutton L.J. in *Sumner Permain & Co.* v. *Webb & Co.*, [1922] 1 K.B. at p. 63.

[2] Chalmers, *op. cit.*, at pp. 66 and 68. As to the difficulties which arise in determining whether goods are "unascertained" or not, see *Re Wait*, [1927] Ch. 606.

[3] This question is too technical and involved for discussion in this place, but reference may be made to *Laws of England* (Halsbury ed.), Vol. XXV, p. 182.

The activities of the Institute are guided by a Council nominated by the League of Nations and presided over by Signor Scialoja.[1] Its administrative work was until recently in the hands of Signor De Francisci who is now the Italian Minister of Justice.[2]

The main object of the Institute is what may, perhaps, be described as clinical research, which for our purposes means the investigation of problems created by the existence of legal barriers to intercourse between the nations, and the formulation of proposals for their removal. Notable services have already been rendered by the Institute in connexion with the law relating to commercial arbitration[3] and the law of negotiable instruments. A library of Comparative Law is in process of formation, which is particularly rich in the books belonging to the legal literature of the Latin countries.

The Institute, therefore, furnishes a *point d'appui* of the very greatest value in connexion with any movement for the unification of private law, and it is for this reason that it has been entrusted with the preliminary work which must be carried out before any scheme for the unification of the law of sale can be said to pass into the realm of practical politics. A committee has been appointed by the Council of the Institute for this purpose, consisting of the following members: Sir Cecil Hurst, Professor Capitant, the famous French *civiliste*, Professor Rabel, the Director of the Institut für ausländisches Privatrecht of Berlin, and Judge Algot Bagge of the Supreme Court of Sweden. In this way it has been possible to secure representation of the four principal systems of law which are concerned in any scheme for unification, i.e. the Anglo-American, the Latin, the Germanic, and the Scandinavian systems. The committee is assisted by three technical advisers, Professor Hamel of the University of Paris, Professor Martin Fehr, the Director of the Handelshogskola of Stockholm, and the writer. The committee has held its meetings in most of the countries from which it draws its membership, and the opportunity thus afforded has been utilized to obtain advice from such well-known lawyers as Professors Wahl and Percerou of the University of Paris, Professors Heymann and Titze of Berlin, Professor Chorley of the London School of Economics, and Professor K. Llewellyn of Columbia University.[1] The committee has also had at its disposal the services of the Institut für ausländisches Privatrecht of Berlin, which, in particular, has compiled a careful survey and digest of the rules of the law of sale in the various legal systems, which is not only a work of the very greatest scientific value but has also relieved the committee of much laborious and thankless spade work.

---

[1] The following countries are represented on the Council: Great Britain, France, Germany, Italy, Spain, Holland, Belgium, Sweden, Roumania, Japan, Brazil, and Chile.

[2] The present under-secretaries are Dr. Ficker of the German judicial service, and Professor René David of the University of Grenoble.

[3] See, for instance, *Rapport sur l'Arbitrage Conventionnel en Droit Privé*, by René David, League of Nations Publications U.D.P. Études III, S.D.N., 1932.

III. *The Deliberations of the Committee of the Institute of Rome.*[2]

It would be premature to attempt to deal in detail with the questions which have been considered by the committee, or to endeavour to sum up the results of its deliberations. The discussions which have taken place have been of an informal character, and it must be remembered that it is not the function of the committee to legislate, but only to make suggestions which will ultimately pave the way for the preparation of a draft or *projet* to be submitted, if thought fit, to an international conference held under the aegis of the League of Nations.

But it is this very informality of its proceedings, this exchange of views across the table, which lends a peculiar value to the work of the committee. The ground which has been covered in the discussions has been *terra incognita* up to the present, and the process of exploration has proved to be both fruitful and instructive. It may, therefore, be of interest to indicate in outline some of the problems which have been under discussion, and to note the tendencies which have revealed themselves in the course of the attempts which have been made to arrive at a solution.

---

[1] Meetings have taken place at Rome (twice), Paris (twice), Berlin, London, Stockholm, Cambridge, and Bordighera.

[2] It must be remembered that the committee has not yet completed its task and that any conclusions it may have arrived at are, therefore, provisional in character.

The general policy which has been adopted by the committee in delimiting the scope of its activities is as follows.

In the first place no attempt has been made to deal with topics of Private International Law. This is not because the importance of such questions has not been recognized, but because the claims both of courtesy and expediency seem to require that there shall be no interference with the sphere of action now occupied by the Diplomatic Conference at The Hague and the International Law Association. In any event it is obvious that the task of attempting to secure uniformity in the relevant rules of Private International Law must be incompatible with a scheme which postulates the abolition of conflict. Secondly, an attempt has been made to free the discussions, so far as is possible, from all influences of a purely doctrinal character. The main object of the committee's labours is not scientific research, but the production of a scheme which will be regarded as of value in the world of affairs. It is proposed to follow the example which has been set by the American Commissioners for the Uniformity of State Laws and to submit any conclusions which may be arrived at to the scrutiny of the various legal, commercial, and financial interests which may be concerned in the matter. It has also been decided that the committee should refrain from dealing with special types of sale contracts, such as those on F.O.B. and C.I.F. terms. The experience derived from such attempts as have been made to secure uniformity in the law relating to these contracts has revealed the very grave difficulties which would arise. The form of the contract in such cases varies very considerably with the nature of the subject-matter, and a rule which is applauded by one section of the business community may be loudly denounced by the other interests involved. Moreover, the bulk trades, in which contracts of the C.I.F. type are most widely employed, are accustomed to the use of standard forms of contract which, in effect, represent an attempt to secure unification, and an international code covering the same ground would meet with a very cool reception. The committee has, therefore, considered it to be advisable to restrict its efforts to the formulation of rules which would meet the needs of individual traders who do not belong to the great Trade Associations and, therefore, suffer to the greatest extent from the uncertainties of the conflict of laws. A question which has given rise to much discussion is whether the international code should be so framed as to deal only with international sales, or whether it should be of such a character as to take the place, for all purposes, of existing laws dealing with sales in general, both domestic and international. No decision has yet been reached on this question, but it may be observed parenthetically that a precedent for a uniform law which is confined to international transactions is to be found in the Berne Railway Convention of 1924. The committee are, however, unanimous on one point, namely, that no distinction should be drawn, as in Continental law, between commercial and non-commercial sales.

It may be of interest to note that in many cases the identical rule is found to prevail in all countries, so that the task of the committee in such a case becomes merely one of considering the form in which the rule should be expressed. In some instances the differences between the national rules are so slight as not to be of serious importance, and the process of unification then becomes one of remoulding rather than of construction. It would, however, be idle to deny that there are many serious divergences between the national systems, and that the task of reconciliation is, in such circumstances, one of very great difficulty. This has proved to be more especially the case, up to the present, with regard to two topics, i.e. (*a*) formation of the contract; (*b*) remedies for non-delivery of the goods. These are problems which call for more than a passing reference to their existence, and I propose to deal with them, though only very briefly.

The formation of the contract of sale. All systems of law have much in common in this connexion, but there are two questions which stand out as giving rise to conflict in a marked degree. The first of these relates to the right of withdrawal of an offer. The Continental systems appear to agree in practice, though perhaps not in theory, that an offer should remain open either for the period stated in the offer, or, where no such period is mentioned, for such a time as will give the offeree a reasonable opportunity of making up his mind. Anglo-American law, owing to the operation of the doctrine of "Consideration", is driven, on the other hand, to permit an unrestricted right of withdrawal before acceptance. The proposal which has found most favour with the committee is in the nature of a compromise. It is suggested that an offer which does not specify a period for acceptance should be subject to withdrawal by the offeror at any time before acceptance, but that where an offer provides for a period during which it is to remain open, it cannot be withdrawn until that period has elapsed. This solution appears to have much to recommend it, as it is a matter of common experience that a trader considers that he has a grievance in fact, if not in law, when an offer for a fixed period is withdrawn before the period has expired. The second and more important problem is that which relates to the conclusion of a contract by offer and acceptance through the post. Anglo-American law has adopted the "expedition" theory and regards the contract as complete when the acceptance has been committed to the post. Continental law is not unanimous on the point, but the tendency is to adopt the "reception" theory and to require that the acceptance should have reached the offeror before it can be said that there is a concluded contract. The committee discussed the rival merits of these two theories at length, but without arriving at a decision. It may be observed, in passing, that one of the difficulties to be surmounted is that on the Continent a letter of acceptance can be retrieved after it has been posted, whereas the contrary is the case in England. This distinction may create an obstacle to uniformity. Finally, it may be added that the committee were unanimous in thinking that, in the case of international sales, it was unnecessary to require written evidence of a contract.

Remedies for non-delivery of the goods. No question which has been before the committee has given so much trouble as the determination of the extent of the rights to be conceded to a buyer in the event of a failure by the seller to carry out his contract. As has been mentioned, the normal remedy in Continental law in such a case is considered to be an order for specific performance, though it may be doubted whether this is a remedy which is always resorted to in practice. M. Trouiller, for many years President of the Tribunal de Commerce of the Seine, informed the committee that it was exceptional, in his experience, to meet with a demand for specific performance of a contract of sale. But be that as it may, it is clear that the Anglo-American countries cannot, in any circumstances, fall into line with the Continent on this question. An order for specific performance is enforced in France by a penalty (*astreinte*), as imprisonment for a breach of civil obligations (*contrainte par corps*) was abolished many years ago. It can, however, hardly be expected that the English courts should abandon their time-honoured practice in this respect. The committee, therefore, propose that this particular question shall continue to be governed as heretofore by the *lex fori*.

The right of rescission on the part of the buyer has also given rise to great difficulties. French law requires a formal repudiation by the buyer consisting in a summons served by the huissier, followed by the institution of an action in which a declaration of the right to rescind is claimed from the court. The committee were informed that the trend of opinion in France was in favour of the abolition of these useless formalities, and it is not anticipated that they will prove to be a stumbling-block to unification. On the other hand, more difficulty may be experienced in getting rid of the theory of German law that a disappointed buyer may not rescind and claim damages simultaneously. This theory is logical, in a sense, because if A has the right to treat a contract with B as at an end, it is perhaps somewhat artificial that A should *uno flatu* be permitted to say that the contract has ceased to exist and also to base a claim for damages on the provisions of the contract. It is not thought, however, that German lawyers will insist on this point if a scheme for unification is otherwise acceptable to them.

The most thorny problem of all was presented by the existence in Continental law of *interpellation*, an institution which is unknown in Anglo-American jurisdictions. To put it quite shortly, both French and German law insist that the buyer should demand performance before instituting proceedings in respect of a breach of contract by the seller. In the case of French law this demand is formal in character and the huissier once more appears upon the scene. An informal demand is sufficient in German law, but the situation becomes otherwise more complicated than in French law owing to the existence, in certain circumstances, of a *Nachfrist*, or further period for performance after default. It is unlikely that the theory of *interpellation* would find favour with English men of business, but the following compromise which has been arrived at by the committee may remove the objections to it. It is thought that the requirement of *interpellation* should be abolished where the contract provides for delivery on a fixed date. On the other hand, where there is no fixed time for delivery—a relatively rare case in present-day international practice—the unified law should adopt the Anglo-American rule requiring delivery within a reasonable time and should couple with it a proviso that the reasonable time shall not be deemed to have elapsed unless the buyer has previously and informally fixed a reasonable date for delivery. This solution is not without its attractions. It limits the necessity for *interpellation* to sales with no date for delivery. Where this is the case the unified law merely requires compliance with a common practice in business circles. A reputable merchant who has bought goods without specifying a time for delivery does not rush off to his solicitor with instructions for the issue of a writ if he considers that there has been unjustifiable delay. He sits down and writes a stiff letter demanding delivery by a certain date and does not embark on litigation until this demand has been ignored by the seller. We thus get in practice a modified form of *interpellation*, and the suggestion of the committee would merely put it on a footing of compulsion instead of business courtesy.

The question of the proper measure of damages for breach of a contract of sale has been discussed by the committee at considerable length. The Continental view is that damages should be assessed on a concrete basis, i.e. that the court must ascertain the actual damage suffered by the aggrieved party and award those damages to him. The rule in *Hadley* v. *Baxendale*[1] has no counterpart in Continental law, and the question becomes one of fact for the judge in most jurisdictions. The committee propose that the normal rule should be the assessment of damages on an abstract basis, i.e. the difference between contract and market price as in Sections 50 and 51 of the Sale of Goods Act, 1893, and that the second branch of the rule in *Hadley* v. *Baxendale* should apply, and that damages should not be awarded for a loss which is not the probable consequence of a breach unless such loss was contemplated by the parties at the time when the contract was concluded as a possible result of a breach.

IV. *Conclusions*

The work of the committee is not yet completed. Only some of the questions which have arisen or may arise have been discussed in the preceding pages. It is thought that those selected will serve to illustrate the policy followed by the committee, which is neither to insist on the adoption of national rules of law, nor to refrain from recommending them when they appear to be best adapted for the purpose of unification. In particular, considerable use is being made of the provisions of the Scandinavian Law of Sale which is in itself the result of unification and has borrowed freely from Anglo-American as well as Continental law. The importance of Scandinavian law is not generally recognized; it is a valuable element in any scheme for unification because it is, like English law, free from Romanistic influences and is consequently in many instances the bridge between the Anglo-American and the Continental systems of law.

---

[1] (1854) 9 Ex. 341.

In conclusion, it is submitted by the writer that the efforts now being made by the committee should at least receive sympathetic consideration. They are not being undertaken in any doctrinaire spirit but are inspired by a genuine desire to give satisfaction to the business community. The existence of many rival systems of law is an undoubted hindrance to international trade. In the domain of the law of transport by sea this unfortunate state of affairs is fully recognized, and the movement is strongly in the direction of uniformity of law. The argument that our national law is adequate loses its force if we consider that in many instances foreign law will be held to govern transactions entered into by English traders. This may happen either because an Englishman is compelled to sue his buyer or seller in a foreign court, or because an English court may in certain circumstances be compelled by the rules of Private International Law to apply a foreign law to a transaction of sale.

Unification of law does not mean that we are to be forced to submit to some other system of law of alien origin. It merely indicates the process by which the differences between the various legal systems are ascertained, followed by the formulation of rules with the object of doing away with those differences. Such rules may be selected from among the rival systems or, as is more probable, new rules will be devised which will seek to combine what is best in each national system with the elimination of that which is antiquated or otherwise unsuitable.

If the Anglo-American countries turn a deaf ear to the present demand on the Continent for uniformity of law, there may be a danger that the other nations will solve the problem in their own way without any regard to the rules of the Sale of Goods Act or the Uniform Law of Sale. The day is past when Great Britain as a creditor nation was in a position to impose English law on its foreign customers, and a continued policy of legal isolation is one which may possibly have unexpected and untoward consequences. There is an old adage that he "who will not when he may" runs the risk of being deprived of another opportunity.

THE END OF THE CAPITULATORY SYSTEM

By NORMAN BENTWICH, M.A., Professor of International Relations in the Hebrew University of Jerusalem

THE system of the Capitulations has been described as a piece of medievalism stereotyped. It had its motive in the doctrine of the Middle Ages as to the "personality" of law, and the existence in the Levantine ports of small trading communities which were separated by religion and manners from the environment in which they carried on their commerce. It is, however, out of accord with the system of the modern world, which is organized as a body of territorial states and which is everywhere marked by the multiplicity of the activities of the state in relation to all the residents within its territory, foreigners as well as citizens. Extraterritorial rights and consular jurisdiction over trading communities were accorded in the Middle Ages by the Byzantine Empire and by the Italian City States; but the Capitulations so-called had their origin in the voluntary grant by the Ottoman Sultans to certain sovereigns of Western Europe in the sixteenth century of the right to establish their factories in the Ottoman Empire and to enjoy liberty of trading and religion, and immunity from local jurisdiction and taxation.[1] They were not extorted by the Christian states as privileges; but they were conceded by the all-powerful Turks as an act of tolerance and out of a desire to encourage European trade. We may get an idea of the place which the Sultan occupied in the minds of European statesmen and jurists in the seventeenth century from the remarkable project of a League of Nations in the book entitled *Le Nouveau Cynée.* The author proposed that, in the order of the precedence of the Sovereigns of Europe, the Sultan should come next to the Pope, both because of his power and because he was to be regarded as the successor to the Eastern Emperor of Byzantium. The Turk had no desire to enforce the Moslem law upon the Christian resident alien. That law was to him what the *Ius Civile* was to the Roman under the Republic—the privilege of the citizen; and as he had not a *Ius Gentium* such as the Romans devised for the stranger within the gates, he left those strangers to apply their own law between themselves. Hence the treaties containing the Capitulations.

---

[1] It is a common fallacy that their name connotes concession and surrender: it is derived in fact from the division into chapters of the treaties by which they were defined.

By the end of the eighteenth century, however, the Capitulations were beginning to take on the character of unequal treaties, by which the European traveller and resident in Eastern countries was placed in the favoured position of exterritoriality and was immune from the jurisdiction, taxation, and legislation of the local sovereign. Moreover, a number of the permanent inhabitants of the Ottoman Empire received the same immunities under cover of foreign protection obtained by real or alleged service in foreign embassies and consulates, or by reason of membership of Christian religious communities, Orthodox or Latin, which were placed under the aegis of the Russian or the French sovereign respectively. As Turkey grew weaker and the European Powers grew stronger, a concession of Eastern generosity was gradually changed to an imposition of Western superiority; and the liberality of the Ottoman Sultans was turned against them into an international servitude that gravely impaired their sovereignty within their dominions. Throughout the nineteenth century there was an attempt on the part of the European states to extend their rights and to convert them into a new engine of political influence or pressure. The Capitulations, which were for two centuries renewed by each Sultan, had now become permanent and binding obligations on the Turk. Correspondingly, there was a movement of the peoples subjected to the régime to get rid of the privileges and to recover their full freedom of action. The Christian nations formerly within the Ottoman Empire, which had been so subjected while under Turkish suzerainty, like Greece, Bulgaria, and Roumania, were released *de facto*, if not always *de iure*, when they obtained their independence; and Japan, which with China had been compelled to suffer them from the middle of the nineteenth century, by reason of her military prowess and her wholesale modernization at the end of the nineteenth century secured their renunciation by all the European Powers. But elsewhere they remained; not only in Turkey and Egypt and the other states of North Africa which were originally subject to Turkey, but also in Persia, China, Siam, and the Malay States, where, under a different name, they were imposed when European expansion spread over the East. It was only as European dominion or protectorate was established over the several territories that the Capitulatory rights were abolished.

Certain differences appear in the different treaties, but there are a number of common features. The common principles include judicial and economic privileges; the inviolability of the foreigner's residence; consular jurisdiction in civil cases between subjects of the same foreign country; a special form of trial and consular supervision over criminal cases in which the foreign subject is concerned; immunity from new legislation and taxation without the consent of the foreign Power. It is the purpose of this paper to examine the disappearance or development of the Capitulations in the countries of the Near and Middle East in which they were still subsisting at the outbreak of the Great War. The modifications of exterritorial jurisdiction in the Far East lie outside its scope.

Since the War there has been a determined, and, broadly speaking, a successful movement in the Near and Middle East to abolish the privileges of foreigners; and, with one notable exception, where they have not disappeared, they seem to be on the way to extinction. Turkey herself, the founder of the system, had throughout the latter part of the nineteenth and beginning of the twentieth century kicked against the pricks without avail. In 1912 she appointed European (including English) legal advisers to reform her judicial system in the hope of winning release from the European states. At the outbreak of the War between the Allies and the Central European Powers, before she herself entered the struggle, she declared by unilateral act the Capitulations absolutely abolished. The Central Powers during the War ratified her action; but the Allies, on the other hand, insisted that it was null because the Capitulations had acquired the status of a bilateral agreement. In the abortive Treaty of Sèvres the Allied Powers inserted a provision for the appointment of a commission to propose modifications of the capitulatory régime; and Turkey undertook in advance to accept its recommendations whatever they might be. Before, however, any definite treaty with the Allies was concluded, she was in a position to claim her rights as a full member of the society of nations; and that is the basis of the provisions in the Treaty of Lausanne, signed in 1923 and ratified in the following year. Though it was not till 1932 that she was admitted to the League of Nations, she henceforth claimed to be, and was recognized as being, an equal member of the international society, enjoying territorial sovereignty and governing her relations to foreign subjects in accordance with the principles of public and private international law.

The preamble of the Treaty contains a declaration that the relations between Turkey and the other contracting Powers must be based on respect for the independence and sovereignty of states.

There is a reciprocal abandonment of privileges, at least in form. By Article 27 Turkey agrees that no power or jurisdiction in political, legislative, or administrative matters shall be exercised outside Turkish territory by the Turkish Government or authorities for any reason over the nationals of the territory placed under the sovereignty or protection of other Powers, or over the nationals of territories detached from Turkey (i.e. the mandated territories). By Article 28, the other Powers accept "the complete abolition of the capitulations in Turkey in every respect". The Treaty contains Minority clauses by which the Turkish Government undertakes to ensure the complete protection of life and liberty for all inhabitants of Turkey without distinction of birth, nationality, language, race, or religion. Turkish nationals belonging to the non-Moslem minorities will enjoy the same civil and political rights as the Moslems, and all inhabitants shall be equal before the law.

A convention attached to the Treaty, concerning conditions of residence, business, and jurisdiction, prescribes reciprocal treatment of nationals of the contracting Powers. Foreign nationals in Turkey shall be treated, as regards property and person, in accordance with the rules of international law. They shall have the right to acquire and dispose of all kinds of property, movable and immovable, to practise different forms of commerce, professions, and industry. Social, industrial, and financial companies, regularly incorporated in the territory of the contracting Power, shall be recognized; in matters of their constitution, legal capacity, and right to sue, they shall be treated in accordance with the national law. They may establish themselves on Turkish territory and engage in all forms of commerce not forbidden to Turkish corporations; and they may acquire movable and immovable property necessary for their operation, provided that the acquisition of immovable property does not constitute the object of their existence. There is to be no discrimination in the incidence of central or local taxation against foreigners; and, on the other hand: "the capitulations having been abolished, Turkey will not grant to the nationals of foreign countries any treatment more favourable than that accorded to her own nationals". That is an almost pathetic repudiation of the inverse privileges of foreigners.

As regards jurisdiction, the subjects of the contracting Powers will have free access to the courts of the country, and may sue and be sued in the same conditions in all respects as nationals of the country. All questions of jurisdiction will be decided in accordance with the principles of international law, with the one exception that in matters of personal status Turkey agrees that, as regards non-Moslem nationals of the other Powers, national tribunals or other competent national authorities established in the country of the party whose personal status is in question shall alone have jurisdiction. Exceptionally, the Turkish court may exercise jurisdiction in these matters if all the foreign parties submit in writing to the jurisdiction of the court; and in such cases the Turkish court will apply the national law of the parties. The anxiety to get rid of all trace of consular jurisdiction, which had become burdensome, is obvious. At the same time Turkey was clearly diffident as to the ability of her judges to deal with these foreign laws of personal status, and so she disinterested herself in cases of that kind. It is notable that a provision to the same effect was made later by Persia when she denounced the Capitulations.

A declaration by Turkey which was attached to the Treaty provides that "the Turkish delegation has had occasion to state that the Government of the Grand National Assembly of Turkey is in a position to assure to foreigners before the Turkish courts all safeguards of a good judicial system". Nevertheless, Turkey is "prepared to have an investigation made and to cause the situation to be studied with a view to the institution of such reforms as may be rendered advisable". Accordingly, she undertook to take into her service for a period of not less than five years a number of legal European counsellors selected from a list, prepared by the Permanent Court of International Justice, of jurists who were nationals of countries neutral during the War. The counsellors were attached to the Ministry of Justice and were empowered to take part in the work of legislative commissions, to forward reports on the courts to the Ministry, and to receive complaints relating to the administration of justice and the execution of sentences affecting foreigners. Their term of service has come to an end, and the system has not been continued. Turkey may be said then to have emancipated herself completely from the self-imposed servitude.

We turn now to Egypt, which was part of the Ottoman Empire from the beginning of the sixteenth century and came as such under the capitulatory régime from the beginning. Egypt has been described as the country of paradox; and while during the nineteenth century she was more modernized and Westernized than Turkey, she retained in special and increasing fullness the privileges and immunities of foreign residents. In addition to the legal obligations of the Capitulations, fresh rights grew up by custom under the rule of the Albanian Pashas, Mohamed Ali and his heirs, who fought for independence against Turkey during the first half of the nineteenth century, and were at the same time anxious to encourage in their country European capitalist enterprise. The rule was established that the local courts could exercise no criminal jurisdiction whatsoever over foreign subjects, and no civil jurisdiction where one of the two parties was a foreigner. In a criminal case the consul of the accused, and in a civil case the consul of the defendant, was competent. The result was a judicial Babel; and the incapacity of the Government to pass any legislation affecting foreigners, save with the approval of the fifteen Powers which enjoyed Capitulations, resulted in a legislative Babel. To escape from the judicial Babel, the far-seeing Egyptian minister, Nubar Pasha, worked desperately for years to obtain the consent of the Powers to the establishment of international tribunals which should exercise jurisdiction over foreigners in all cases. In the end he had to be content with the agreement to vest civil jurisdiction in the Mixed Courts, as they were called, composed of judges of all the Capitulatory Powers and a minority of Egyptians, over all cases between foreigners of different nationalities or between foreigners and natives or between foreigners and the Government. The criminal jurisdiction remained with the Consular Courts.

Even this reform was only accepted as provisional for a period of five years, and might be denounced thereafter by any of the Capitulatory Powers. But it is only the provisional that endures in Egypt; and the Mixed Courts, initiated in 1876 and renewed till recently at intervals of five years or less, have passed their jubilee year and are now regarded as part of the permanent machinery of justice. They are international in their composition; but they hold their power from the Egyptian sovereign, though they act only with the assent of the foreign states. It has been said of them that they are the most successful international institution after the Roman Church. They have been alert to press their jurisdiction over the Egyptian Government at the suit of any person aggrieved by an administrative act; and by the extension of the theory of "the foreign interest" they have enlarged their competence so as to oust in large measure the jurisdiction of the native courts in commercial matters. Nevertheless, they have gained the confidence of the natives as well as of the foreign population in Egypt, and they are regarded generally as a Palladium of Justice. International courts, similar in composition and jurisdiction, have been set up at Tangier, the international enclave of Morocco.

While some of the embarrassments of the Capitulatory system have been overcome by the establishment of this international judiciary, the other discriminatory features still hold in Egypt, and that in an aggravated form. Save for a meagre list of police offences and offences against the courts themselves, or offences concerned with bankruptcy, the Egyptian courts have no authority in criminal cases over foreigners; the house or business premises or ship of a foreign subject or corporation cannot be entered save in the presence of the consul; and the Egyptian Government cannot pass legislation, fiscal or general, which binds foreign subjects, save with the consent of all the Capitulatory Powers. When the Mixed Courts were instituted new Codes were prepared on the model of the French Codes, and accepted by the Powers which adhered to "the Reform". The only provision made for amending or amplifying the Codes was the right of the whole of the Mixed Magistracy to adopt minor changes in the law. The curious combination of judicial and legislative power was applied for the purpose of adding to the list of police offences within the competence of the Mixed Courts; but that power was very narrowly hedged in by several of the foreign states. In his final report on Egypt in 1906, Lord Cromer pointed out that the supreme need of good government in the country was the establishment of a legislature which should have authority for all the inhabitants of the country, native and foreign.

Protracted deliberations of an international commission, which was to make proposals for overcoming the legislative *impasse*, produced "a small but not altogether ridiculous mouse". In 1911 an amendment of the statute of the Mixed Courts was accepted, by which a legislative body, composed of one judge of each country from the Mixed Court of Appeal and the senior judge of those countries which were not represented on the Court of Appeal, could adopt amendments or modifications of the Mixed Codes. That change has to a small extent relieved the law-making impotence of the Egyptian Government over foreigners; but hitherto the incapacity to impose any fresh taxation has remained unaltered, save during the War, when the undiscriminating authority of martial law could be invoked.

Since the War several projects have been put forward for relieving Egypt from the burden of Capitulations; and the emancipation of Turkey has emphasized the unreason of their continuation. The Royal Commission presided over by Lord Milner, which contained among its members Sir Cecil Hurst, formulated a scheme by which the Mixed Courts were to take over the whole jurisdiction of the Consular Courts; but the opposition of the greater Powers prevented the acceptance of that proposal. The draft treaties made between Great Britain and the Egyptian Government in 1929 and 1930 concerning the independence of Egypt contained a clause declaring that

> "His Britannic Majesty recognizes that the Capitulatory régime now existing in Egypt is no longer in accordance with the spirit of the times and with the present state of Egypt. His Britannic Majesty accordingly undertakes to use all his influence with the Powers possessing Capitulatory rights in Egypt to obtain, in conditions which will safeguard the legitimate interests of foreigners, the transfer to the Mixed Tribunals of the jurisdiction of the existing Consular Courts and the application of Egyptian legislation to foreigners."

That is the scheme which awaits adoption and execution.

The problems of jurisdiction should not be difficult to settle, because there is a general consensus of opinion that the Mixed Courts should become courts of general jurisdiction, and the consuls should cease to maintain their hydra-headed authority over their subjects in criminal matters and matters of personal status. The legislative problem may be more difficult of solution. The foreign population of Egypt, though only one per cent., some 150,000 persons in a population of fifteen millions, is so dominant in commerce and economic life that it can fairly claim to have a separate voice in the legislature of the country. Perhaps Egypt will lead the way for the world in the recognition of the foreign interest in a parliament, as it has led the way in the recognition of a foreign interest in its judiciary. The Municipality of Alexandria has to-day its quota of foreign representatives, and so perhaps the future parliament of Egypt may have its fixed number of foreign deputies. In Egypt, then, there is the prospect that the Capitulations will pass into an international institution, not only judicially, as has already been accomplished, but also legislatively.

The position of the Capitulations is different in the territories which were detached from Turkey by the Treaty of Peace. In the countries which before the War were severed from the Ottoman Empire and brought under European rule or administration, Tunis, Tripoli, Cyprus, Rhodes, &c., the Capitulations were immediately abolished by the new ruler. And in those Balkan states which one by one threw off Turkish suzerainty the same result was reached when they attained independence. There is indeed an anomalous position in Bulgaria, where the French claim, and the Bulgarians repudiate, their right to resume certain Capitulatory privileges in view of the terms of the Treaty of Neuilly concluded at the end of the Great War.[1] With this exception, however, there has been no dispute as to the extinction of the foreigner's privileges once Turkish rule was superseded. In regard, however, to the territories placed under the mandate of Great Britain and France after the Great War a different standpoint was taken. Suspension and not extinction was stipulated. The Mandate for Palestine, which may be regarded as typical, provides:

> "The privileges and immunities of foreigners, including the benefits of consular jurisdiction and protection as formerly enjoyed by Capitulation or usage in the Ottoman Empire, shall not be applicable in Palestine. Unless the Powers whose nationals enjoyed the aforementioned privileges and immunities on August 1, 1914, shall have previously renounced the right to their re-establishment, or shall have agreed to their non-application for a specified period, these privileges and immunities shall, at the expiration of the Mandate, be immediately re-established in their entirety or with such modifications as may have been agreed upon between the Powers concerned."

The illogicality of the provision has been pointed out before the Mandates Commission; it is incongruous that the judicial incapacity should be restored at the stage when the Government of the infant state is found capable of standing alone and doing justice to all the inhabitants. In fact the restoration of the old régime, if and when the mandate is ended, is most improbable.

The Mandates for Palestine and Syria contain also a provision that the Mandatories shall be responsible for seeing that the judicial system shall assure to foreigners as well as to natives a complete guarantee of their rights. In application of this provision the Mandatory Governments have provided for a special form of composition of the courts for the trial of cases in which foreign subjects are concerned. Broadly, the principle is adopted that in the more serious criminal cases a foreigner shall be tried by a foreign judge or by a court with a majority of foreign judges; and in the more important civil cases he shall be entitled to require the presence of one foreign judge in the first instance, and a majority of foreign judges in the court of final appeal. Lastly, in matters of personal status of a foreigner, the court is composed by a foreign magistrate, who in Palestine may invoke the assistance as an expert of the consul of the foreign subject concerned to advise on questions of the national law.

---

[1] See "La Question de la prétendue Existence des Capitulations en Bulgarie." *Journal du Droit International*, 1931, p. 352.

A similar system was instituted in Iraq under the judicial agreement between the British Government and the King of Iraq, which was accepted by the Council of the League of Nations as part of the arrangements to take the place of the mandate instrument. In 1930, however, Great Britain put forward to the Council of the League proposals for a fresh judicial agreement, which were based on the principle of a uniform administration of justice for all inhabitants of the country and swept away any discrimination in the composition of the courts for the trial of privileged foreign subjects. The countries which did not enjoy capitulatory privileges in Iraq, particularly Persia, protested against the discrimination which was involved under the original system; and the Iraqis themselves regarded it as a slight. The new judicial agreement, which was signed and ratified in 1931 and has been approved by the Council of the League, declares that the agreement of 1924 is incompatible with the standard of justice administered in the courts of Iraq, and that the special measures to safeguard the interests of foreigners are no longer required. A new system of justice, applicable to all Iraqis and foreigners alike, is established. At the same time the number of British judicial officers in the service of the Iraqi Government has been increased; and the Permanent Mandates Commission, which in 1931 considered the recommendation of Great Britain for the termination of the Mandate, suggested that some further increase might be desirable for the safeguarding of the good administration of justice. With this exception of a foreign element for the supervision of the courts, the only relics of foreign privilege which remain in Iraq—and they are hardly worthy of the name—are that:

(*a*) The consular representative of a foreign state shall at all reasonable times have free communication with any national of his state who is under arrest.

(*b*) A foreign party in civil or criminal proceedings, who does not follow the Arabic language, may claim that the proceedings shall be translated into his native tongue, or, when that is not possible, into English or French.

(*c*) No house or other premises may be entered save on the warrant of a magistrate, except in urgent cases.

(*d*) In matters relating to personal status of foreigners, the

> President of the Civil Court which has jurisdiction may invite the consul or representative of the consulate of the foreigner concerned to attend as an expert for the purpose of advising upon the personal law concerned.

It may be said, therefore, that in the new State of Iraq, the judicial as well as the economic Capitulatory privileges have been extinguished.

In Syria and Palestine, as well as in Iraq, the other burdens of the Capitulatory system, the religious protection by foreign states of certain communities and the immunity of foreign subjects from new legislation and fresh taxation, have completely disappeared. There is one law for all inhabitants, and there is full freedom of fiscal action. The consular jurisdiction remains only for non-contentious matters of personal status. It may be that the Governments of Syria and Palestine will be induced to follow the example of Iraq, and substitute for the difference in the composition of courts for the trial of native citizens or foreigners a uniform administration of justice, in which a guarantee for integrity and proper application of the law will be afforded to all by the presence of a certain number of French or British judicial officers.

The evolution of the Capitulations during the last twenty years indicates that no single system has been adopted to give effect to the general desire for the removal of this piece of medievalism. There is one goal—a single system of law, a single system of courts; absence of privilege and discrimination in favour of the foreigner. That may be reached, as in Turkey and Persia, by a complete repudiation of the Capitulations, while leaving matters of personal status to be dealt with by a foreign court. It may be reached, as in Palestine, Syria, and Iraq, by appointing foreign judges for a time to supervise and train the judiciary of the country. Lastly, it may be reached, as in Egypt and also in Tangier, by the establishment of international courts for dealing with cases of foreigners. The problem of legislation binding on foreigners has been solved everywhere save in Egypt by the elimination of privilege. In Egypt it may be solved by the introduction of an international element into the legislature. If that happens, it will be a remarkable example of the transformation of foreign privilege into international co-operation.

One permanent survival of the system of which the Capitulatory régime is a part has indeed established itself in the international society. That is the appointment of consuls as the representatives of foreign states abroad, to exercise a certain administration over their nationals. The consul was originally a magistrate of the foreign state, appointed to look after the interests and judge the causes of the members of his state abroad; and although to-day he has lost a large part of the magisterial function, he still exercises a number of semi-judicial powers. The general admission of the consular office is a salutary exception to the principle of the exclusiveness of the territorial competence with regard to foreigners, and a survival—very attenuated, indeed—of the system of personality of law in international relations. The Capitulations and extraterritorial jurisdiction in the Far East became in their political development during the eighteenth and nineteenth centuries an abnormal extension of that consular régime. They seem certain in the twentieth century to pass away, giving place, perhaps, to the extension of a system of international courts to which foreigners, aggrieved by the judgments of national tribunals, may carry their suit.

STATE IMMUNITY FROM PROCEEDINGS IN FOREIGN COURTS[1]

By G. G. FITZMAURICE

I

A RECENT case in the Belgian courts[2] has raised in an interesting form the question of the extent of the immunity accorded to states under international law in respect of proceedings in foreign courts. There are, as is well known, two schools of thought on this subject. The one recognizes the complete immunity of states from any kind of process in a foreign court except such as may be submitted to voluntarily; the other seeks to distinguish between the state acting in a sovereign and in a non-sovereign capacity, admitting immunity in regard to acts of the former kind, but denying it in regard to the latter.

In the case above referred to, the Greek Government purporting to act under Section IV of Part X of the Treaty of Versailles had annulled, by decree, certain bonds the property of the plaintiffs. It so happened that the Greek Government had deposited sums in Belgium with a Belgian company who were doing work for the Greek Government. The plaintiffs accordingly applied in the Belgian courts for a *saisie-arrêt* in respect of these sums (the equivalent of garnishee proceedings in England) and were successful in obtaining a provisional order. The Greek Government moved to have it set aside on the grounds, *inter alia*, (1) that the Belgian courts could not entertain any proceedings against a foreign state or government in respect of any matter whatever; (2) alternatively, that the Belgian courts could not entertain any action against the Greek Republic in respect of any act involving the exercise of Greek sovereignty, and that the present matter came within this category as it turned on a Greek decree issued to give effect to a provision of the Treaty of Versailles; (3) that in any event it was contrary to international law for the

---

[1] The object of this article is to review certain recent cases in the courts of a number of countries regarding state immunity, and to discuss the issues arising from them. No attempt has, however, been made to deal with the particular case of the immunity of state-owned vessels, which has formed the subject of previous articles (see Bisschop and Garner in *B.Y.B.*, Vols. III and VI; Nielsen in *A.J.I.L.*, Vol. XIII), and almost all the cases reviewed are non-maritime.

[2] *Bartin* v. *République Hellénique*, reported in *La Belgique Judiciaire* of October 15, 1932.

Belgian courts to sanction any measures of execution against the property or assets of a foreign state, and that the *saisie-arrêt*, if confirmed and executed, would be a measure of execution.

The court's finding on the first of the above points was contrary to the contention of the Greek Government, that is to say it considered that immunity could only be claimed in respect of acts of a sovereign character. On the other hand, it found in favour of the Greek Government on the second point, considering that the act in question in the present case had been an act of sovereignty. The court was also in favour of the Greek Government on the third point, taking the view that measures of execution against the property of a foreign government were contrary to international law. On this last point it is clear by implication that the court would have considered such measures improper even if the proceedings had been in respect of some non-sovereign act as to which (according to the Belgian view) the courts would have had jurisdiction and could have entered judgment against the Greek Government if the merits of the case had warranted it. A further point of interest is that the court considered that the deposit by the Greek Government of funds with a Belgian company did not imply any submission to the jurisdiction of the Belgian courts or any waiver in regard to these funds of the rule against taking the property of a foreign government in execution.

This decision is in conformity with previous Belgian decisions on the subject, and it is, therefore, clear that in Belgium only a partial immunity from proceedings is recognized in favour of foreign states or governments, but that, on the other hand, complete immunity is accorded in regard to all measures of actual execution (unless of course the foreign state consents to waive its immunity).

In the course of the argument in the above case it was alleged that the practice of the Greek courts was similar to that of the Belgian in this matter, and reference was made to a case heard in 1928 in the Athens Court of Appeal.[1] Reference to this case, however, makes it very doubtful how far Greek jurisprudence is in reality similar to Belgian on this subject. It appears that proceedings were brought against the Soviet Government in the Greek courts for breach of a contract made in Greece between a Soviet trade representative and a Greek national for the supply of cattle from Russia. The Soviet Government pleaded (*inter alia*) that it was immune from proceedings in the Greek courts. The courts found that in fact a breach of contract on the part of the Soviet Government had not been proved, but they refused to find that they had no jurisdiction in the matter. It is, however, not clear that their view on the latter point was founded on the fact that the act of the Soviet Government (viz. in entering into an ordinary commercial contract) had been of a non-sovereign nature. In the first place it appears that the contract itself contained a clause providing that in the event of a dispute the matter should be referred to "Greek arbitration", from which it was possible to infer a voluntary submission to the Greek courts, and apparently the court did in fact draw this inference. Again, it appears that the court was inclined to draw a similar inference from the mere fact that the Soviet Government had, through its representative, entered into a contract in Greece to be fulfilled in Greece.

---

[1] Reported in *Themis*, Vol. XL, No. 486.

It thus appears that the decision in question was founded not on the notion that there is no right to immunity where acts of a non-sovereign nature are concerned, but on the inference which (rightly or wrongly) the court drew, to the effect that on the facts there had been, or must be assumed to have been, a voluntary submission by the Soviet Government. The question whether such an inference was justified will be discussed later.

A somewhat similar attitude appears to have been adopted by the Austrian courts. In a case which occurred in 1920,[1] a foreign ambassador in Vienna, apparently acting on behalf of his Government, had entered into a contract in Austria for the carrying out of certain works in the Embassy building. Payment not being forthcoming, proceedings were instituted in the Viennese courts against the state represented by the ambassador. The matter eventually found its way to the Supreme Court, which, upholding the decision of the Court of Appeal reversing that of the court of first instance, decided that there was jurisdiction. The precise basis of the decision is not entirely clear, but it was said that if a foreign state appears in Austria as a "subject of private rights" and concludes contracts to be fulfilled in Austria, then it "enters into the legal system of the Austrian state" and can no longer remain independent of it, and that in such cases the foreign state is subject to the jurisdiction of the courts of the country in which the contract has been made. This language certainly suggests that the *ratio decidendi* was an inference of voluntary submission or implied waiver on the part of the state concerned rather than the performance by it of an act of a non-sovereign character.

---

[1] See *Annual Digest of Public International Law Cases* (Williams & Lauterpacht) *1919–22*, Case No. 79.

A somewhat similar, and, in that it related to the question of execution, more drastic decision occurred in the German courts in 1920.[1] The Turkish Government, through a purchasing commission in Germany, had contracted for the purchase of certain goods, and had at the same time opened a banking account in Germany for the specific purpose of financing these purchases. Further, in the contracts of sale the jurisdiction of the German courts was recognized for any disputes which might arise. Alleging a default, the German contractors asked for the attachment (*a*) generally of any available Turkish Government property in Germany, (*b*) in particular of the banking account above mentioned. It was objected that the German courts were not competent inasmuch as a foreign government was involved. The Prussian Tribunal for Conflicts of Jurisdiction considered that under the terms of the contract the jurisdiction of the German courts had been recognized (i.e. voluntary submission), but that this recognition in the contract did not *per se* extend to measures of actual execution or attachment. Consequently there was no power to decree the attachment of the property in general of the Turkish State in Germany.[2] As regards the banking account, however, there was a further and specific submission, extending even to the attachment of the account, and arising out of the fact of depositing money as security for the fulfilment of the contracts. The only purpose of the account was to satisfy the claims of the private firms concerned; consequently the purchasing commission (representing the Turkish Government) must be regarded as having impliedly agreed to measures of execution by the German courts in respect of this account (presumably where a claim by one of the firms concerned was in question).[2]

It may be desirable at this point and before going on to consider the jurisprudence of other countries to refer to the position under English law, with particular reference to the theory of voluntary submission as exemplified in the above-mentioned decisions of the Greek, Austrian, and German courts. As is well known, the English courts do not admit of any distinction between the sovereign and non-sovereign acts of a foreign state or government, and recognize immunity from proceedings in all cases except where there has been a voluntary submission or where the foreign state or government, having itself initiated the proceedings, a counter-claim in the nature of a set-off is raised by way of defence. The only exception to this rule conceivably possible under English law, although it is not believed that any case has ever in fact arisen, is that of proceedings against a foreign state or government regarding the title to real property in England. This matter will be dealt with more fully below. Apart from any such possible exception, it is only an actual voluntary submission which will confer jurisdiction on the English courts; and it is to be noticed that those courts are much stricter in their interpretation of what constitutes a voluntary submission than has apparently been the case in the courts of certain foreign countries. A leading case on the subject, of recent occurrence, is that of *The Duff Development Company* v. *The Government of Kelantan.*[1] From this case it is clear that nothing short of an actual submission in respect of the particular proceedings before the court will suffice to give an English court jurisdiction; a mere agreement to submit will not suffice. It will be remembered that in the case in question the Government of Kelantan had granted to the plaintiff company certain mining and other rights by a deed which contained an arbitration clause incorporating the Arbitration Act 1889. The Arbitration Act 1889 of course contains provisions whereby in certain cases arbitral proceedings may eventually find their way to the ordinary courts, and there is little doubt that on this basis the courts of e.g. Greece or Austria would probably have decided that there was an implied submission to the jurisdiction of the local courts. Moreover, in the Kelantan case a reference to arbitration having taken place, the Government of Kelantan applied to the Chancery Division to have the award set aside, and this again it was contended amounted to a general submission to the jurisdiction of the English courts. Nevertheless, both in the Court of Appeal and in the House of Lords it was decided that no such submission had in fact occurred. In the latter Lord Cave said (p. 110 of the Report): "If a sovereign, having agreed to submit to jurisdiction, refuses to do so when the time arrives, he may indeed be guilty of a breach of his agreement, but he does not thereby give absolute jurisdiction to the court." Lord Dunedin said (p. 821): "He has broken his contract, but the court has no jurisdiction to enforce any performance of it. It seems to me to say that by agreeing to submit he did submit is to argue in a circle." Lord Sumner said (p. 829): "There is no principle upon which such consent" (viz. to the jurisdiction) "can be deemed to have been given short of action taken towards the court itself." It follows, therefore, that, according to English law, the fact that a foreign state or government has in a private contract agreed to submit a dispute to the English courts does not amount to an actual submission, and does not give the English courts jurisdiction. *A fortiori* the mere fact that a foreign state or government has entered into a commercial contract in England or to be performed in England is not considered as in any way giving jurisdiction to the English courts on the grounds of voluntary submission. It is also safe to say as a corollary that the fact that a foreign state or government may have funds in this country or may have deposited moneys as a guarantee for the fulfilment of a specific contract will equally not be regarded as implying any voluntary submission or as conferring any jurisdiction on the courts.

---

[1] See *Annual Digest 1919–22*, Case No. 77.

[2] It is of interest to compare this decision with that of the Belgian court in the case mentioned at the beginning of this article. It will be remembered (see *supra*, p. 102) that the Belgian court refused to admit that funds of the Greek Government in Belgium could be attached in any circumstances, even in cases where the courts had, according to Belgian law, jurisdiction to hear the case. It is true that in that case the funds had been deposited in respect of a totally different matter than the one before the court; but there is no reason to suppose that the decision would have been different even in different circumstances.

---

[1] [1924] A.C. 797.

The same principles appear to apply in England not only as regards the question of the actual jurisdiction of the courts to hear and determine cases against foreign states or governments, but also to the question of levying execution. There is reason to suppose that before execution can be levied on the property of any foreign state or government, an actual consent or submission to such execution must take place over and above any submission which may already have occurred in regard to the proceedings in respect of which the demand for execution arises. Thus, if proceedings are brought against a foreign government and voluntary submission takes place, a court can hear the case and can, if the facts and the law warrant it, give judgment against the foreign government concerned; but it would seem that this judgment cannot be actually executed against property of the foreign government unless a further and separate submission takes place. The authority for this principle also rests on the Government of Kelantan case. It will be remembered that the Government of Kelantan had applied to the Chancery Division to have an arbitration award set aside. Although, as the House of Lords subsequently decided, this did not amount to a general submission in regard to the case as a whole, it was of course a submission in regard to the particular matter of setting aside the award. The court, however, refused to set aside the award and gave costs against the Government. Garnishee proceedings were thereupon taken to attach moneys due to the Kelantan Government from a third party in order to satisfy the award as to costs, but on the matter being taken before the Court of Appeal, it was decided that, although the Government of Kelantan had, by initiating proceedings to set aside the award of the arbitrator, submitted *pro tanto* to the jurisdiction of the court, that submission had not *per se* the effect of rendering liable to execution property belonging to the Government and situated within the jurisdiction. The point did not arise for decision in the House of Lords, and the decision of the Court of Appeal on this point therefore stands. It is true that in the House of Lords both Lord Dunedin and Lord Carson referred to the point and expressed doubt as to whether it had been correctly decided. On the other hand, Lord Sumner said that he saw no occasion to doubt the reasoning on which the decision in question had been based. It is consequently impossible to say what view the House of Lords would take if the matter ever came before it, but at present the position undoubtedly is as decided in the Court of Appeal.

It is submitted that the English interpretation of what constitutes a voluntary submission, though possibly erring a little on the side of over-strictness, is substantially correct, and that the term becomes devoid of all meaning if construed so widely as to cover, e.g., the mere fact of entering into a private contract with a foreigner in his own country.

It now seems possible to detect three broad streams of thought on the question of state immunity. In the first place, there are those states, such as England and the United States, where complete immunity is recognized on all points, except where there has been a voluntary submission (or possibly where the subject-matter of the proceedings consists of real property situated within the jurisdiction of the court, not being property, such as embassy premises, necessary for the exercise of the sovereign functions of the foreign state concerned). It is, moreover, to be noticed that in such countries the notion of voluntary submission is strictly construed. Nothing short of a submission directed towards the court itself in respect of the actual proceedings is sufficient. Moreover, a submission in respect of the proceedings does not normally imply a submission to execution. Further, a submission in respect of one matter does not imply any submission in respect of another. Thus, the fact that the foreign state or government appears as plaintiff does not imply a submission to a counter-claim or cross-action except such as may be in the nature of a genuine set-off arising out of the same subject-matter.

Secondly, there are those states, of which Belgium has been instanced as an example, where a distinction is drawn between the action of foreign states in their sovereign and in their non-sovereign capacity. Even, however, in such countries, where proceedings are permitted against a foreign state in respect of matters in which it has acted in a non-sovereign capacity, it is as a rule admitted that no execution can be levied on the property of a foreign state except by its consent. Italy, and to a lesser extent Czechoslovakia, appear to be exceptions in this respect, and to maintain that execution may be levied against the property of a foreign government in any case where proceedings against that government can be entertained in the local courts, and provided the property is not in the nature of an embassy building or a ship of war necessary to the exercise of the foreign government's sovereign functions.

Finally, there are those states which technically appear to maintain the principle that a foreign government is completely immune from proceedings in the local courts except in cases of voluntary submission or where real property is concerned, but which in practice allow of the foreign government being sued in cases where it has entered into commercial or other transactions of a private nature, by interpreting the notion of voluntary submission in a very wide sense. Instances have been given above of cases where a foreign government has been deemed to have submitted to the local jurisdiction by reason of a clause in a contract agreeing to do so, or even by the mere fact of entering into a contract within the jurisdiction of the local courts and to be discharged within that jurisdiction. Similarly, as already stated, the deposit of funds in a local bank, for the purpose of financing a contract between some local individual or company and the foreign state concerned, has been held to imply a voluntary submission not only to proceedings, but also to the levy of execution on such funds.

A further point which may be noticed, on which the practice of states differs, is in regard to juristic entities legally distinct and separate from a government, but which in fact act for it or were formed for the express purpose of carrying on activities on its behalf in foreign countries. Certain countries refuse to look behind the entity concerned, and regard it as standing on exactly the same footing as any other legal person so that it can be sued in the local courts in the ordinary way. In other countries it appears that the courts will look behind the entity, and if the action which is brought against it is in essence one against the foreign government which it represents, the principle of immunity is allowed full play.

The United Kingdom has already been instanced as a state coming within the first of the above classes. Japan also appears to come within this class, if one may judge from the case of *Matsuyama and Sano* v. *The Republic of China* which was heard in the Supreme Court of Japan in 1928 (7 Supreme Court Decisions, 1128).[1] The plaintiffs, private Japanese citizens, were holders of notes drawn by the Chinese Chargé d'Affaires in Tokio on behalf of his government, payment of which was refused on presentation. The plaintiffs brought proceedings against the Chinese Government in the Japanese courts. The Supreme Court held that:

> "Inasmuch as no state acknowledges the authority of another except as an act of voluntary submission, a foreign state in principle is not amenable to our law in a civil process unless some peculiar ground, such as the fact of the proceedings being *in rem*, exists. That there may be an exception is undoubted under international law when and in so far as such state deliberately accepts our jurisdiction, and this may comprise occasions provided for by a treaty or those in which it has expressed its willingness to abide by the decision of our courts in the particular instance or in contemplation of certain specific cases. But concessions of that nature must always and necessarily be made between the states concerned. Thus, although an agreement might be concluded between a foreign state and an individual Japanese subject, in which the former on its part agreed to recognize the competence of our Civil Code, the agreement would not operate *per se* to bring that state under our jurisdiction."

From this it appears that Japanese law does not draw any distinction based on the sovereign or the commercial nature of the act, nor does it infer a voluntary submission from the mere fact that the foreign state has entered into a private contract, or even from the fact that such a contract may contain a clause agreeing to submit disputes to the local courts. Under Japanese law, however, the foreign state would apparently be regarded as having made a voluntary submission if it had entered into a treaty with the Japanese Government to that effect. In this respect Japanese law appears to go farther than English law. There is reason to doubt whether, apart from special legislation, the fact that a foreign government had by treaty made itself amenable to the jurisdiction of the English courts would *per se* operate to give those courts jurisdiction supposing, in regard to any given proceedings, the foreign government chose to infringe the treaty and refused to submit. On the principle that nothing short of a submission directed towards the court itself will suffice, it would appear that a treaty obligation is not in itself enough to give English courts jurisdiction, though a failure to submit would, of course, involve a breach of the treaty.

---

[1] *Annual Digest 1927–8*, Case No. 107.

In the United States the position is substantially the same as in the United Kingdom and Japan, and the United States courts appear to construe the notion of voluntary submission strictly. Thus, in the case of *The Republic of France* v. *Pittsburg Steel Export Co.* (112 Misc. (N.Y.) 688),[1] the City Court of New York held that:

> "The Republic of France, a friendly foreign sovereign Power, may not be sued in our courts without its consent, and by bringing this suit it has not waived its immunity to the extent that the defendant may ask for affirmative relief against it. While in the circumstances of this case the defendant might set up a counter-claim which arose out of the same transaction declared on in the complaint and then only to the extent necessary to defeat it, an affirmative judgment against the plaintiff may not be rendered without its consent. The counter-claim alleges a distinct and collateral transaction in no way connected with the cause of action pleaded in the complaint."

Precisely the same principle was maintained in the case of *French Republic* v. *Inland Navigation Co.* (263 Fed. 410)[2] by the United States District Court of Missouri.

On the other hand, it appears that the United States courts will not, as a rule, in proceedings brought against what appears to be an ordinary juristic entity, take cognizance of the plea that the entity is in reality representing or acting for a foreign government. Thus, in the case of *Coale* v. *Société Co-opérative Suisse des Charbons* (21 F. (2nd) 180),[3] before the United States District Court of New York, the position was that the Swiss Federal Council had delegated to the Swiss Department of Commerce the power to control the importation and distribution of coal. The Department of Commerce in its turn caused the Société Co-opérative Suisse des Charbons to be organized to purchase and import coal from abroad. A contract was entered into in the United States, signed by the Swiss Minister to the United States on behalf of the

---

[1] *Annual Digest 1919–22*, Case No. 89.

[2] *Ibid.*, Case No. 87.

[3] *Ibid.*, Case No. 88.

Société. The plaintiffs, American citizens, brought an action on the contract for failure to take and pay for the coal. The Société claimed immunity as being the organ of a foreign government. The Court held that the Société was not immune and said that:

> "If the Swiss Government chose to do its business by means of the Société, the latter as a corporate entity was liable for its corporate obligations. If the Société had contracted as agent for the Swiss Government the case might have been different, but in this instance the Swiss Minister signed the contract for the corporation."

Germany must also apparently be classed amongst the states which recognize complete immunity, although the *Turkish Purchases Commission* case, which has already been noticed (*supra*, p. 104), is indicative of a tendency to move towards the third class, namely, those which, while in theory maintaining the principle of complete immunity, depart from it in practice by a wide construction of what constitutes a voluntary submission. Apart from this case, however, the jurisprudence of the German courts appears to have been fairly constant in favour of complete immunity. Thus, in the *Polish Loan Bank* case[1] the Prussian Tribunal for Conflicts of Jurisdiction declared (*Juristische Wochenschrift*, 1921, p. 1481), that according to international law a foreign state both in its public capacity and in transactions of a private law nature is not subject to the jurisdiction of the courts of another country except in cases of voluntary submission and in matters involving immovable property. The same principle was laid down in almost identical terms in the later case of *Halig* v. *The Polish State*[2] in the same court. In the same case the court also stated that even if it could be assumed that there was a contract of lease between the plaintiffs and the Polish State, the existence of such a contract would not imply a voluntary submission on the part of the Polish State to the jurisdiction of German courts in matters arising out of the contract. It appears, therefore, that the German courts will not ordinarily go so far as to imply a voluntary submission from the mere fact that a state has entered into a private contract with a local citizen. It will be remembered that in the *Turkish Purchases Commission* case (*supra*, p. 104) there was not only a contract, but a clause in the contract expressly recognizing the jurisdiction of the German courts, and, moreover, that money had been deposited in a German bank for the express purpose of financing the contract.

Two other points decided in the German courts may be noticed.

---

[1] *Ibid*, Case No. 78.

[2] *Annual Digest 1927–8*, Case No. 104.

In the *French Shares* (cross-suit) case[1] the Prussian Tribunal for Conflicts of Jurisdiction decided (*Juristische Wochenschrift*, 1930, p. 213), that a foreign state does not, by bringing an action before the German courts, necessarily submit itself to their jurisdiction in regard to any cross-suit which the defendant may put forward, and that it was in each case for the court to decide how far submission to the jurisdiction could be implied from the fact of the foreign state having brought an action. From this it would seem that on this point German law is probably the same as English and would permit a counter-claim in the nature of a set-off, but would not allow a counter-claim to be brought which had no connexion with the subject-matter of the original proceedings. In the *Polish Loan Bank* case, referred to above, the proceedings were in form brought by German nationals against a Polish bank and not against the Polish State. The bank, however, although a separate juristic entity, was in fact owned by the Polish Government. In consequence of this, the court refused to entertain the action, taking the view that, whatever its form and notwithstanding the fact that the bank was a separate entity, the action was in essence one against the Polish State. This decision may be compared with the apparently contrary practice of the United States courts on this point, noticed above.

The Czechoslovakian courts also apparently recognize the complete immunity from jurisdiction of a foreign state except in cases of voluntary submission or where local real property is concerned, other than property such as embassy grounds necessary for the exercise of sovereign functions. A case of some interest occurred in the Supreme Court of Czechoslovakia in 1928.[2] A Czechoslovak national had won a case against the Hungarian Government before the Czechoslovak-Hungarian Mixed Arbitral Tribunal. He ceded his claim to a bank, which applied in the Czechoslovakian courts for execution of the decision of the Mixed Arbitral Tribunal by the compulsory sale of certain immovable property of the Hungarian State situated in Czechoslovakia. It has been remarked above that, with the exception of Italy, even those states which entertain proceedings against foreign governments in matters of a non-sovereign nature do not go so far as to claim that actual execution can be levied except with the consent of the state concerned. It has also been noticed that almost every state regards its courts as having jurisdiction over a foreign government not only in cases of voluntary submission but where local real property is affected. However, most of these states (again except Italy) do not pretend that execution can be levied against such real property belonging to a foreign government except with the consent of the latter. On this particular point Czechoslovakia appears, in company with Italy, to form an exception. In the case under discussion the court held that, as it would undoubtedly have jurisdiction to entertain a case against the Hungarian Government in respect of the title to any property owned by the Hungarian Government in Czechoslovakia, so, therefore, it must have jurisdiction to levy execution against such property. It appears, however, that the property of the Hungarian Government which was affected by this decision happened to be the premises of the Hungarian Legation. This fact was not known to the court. Had it been known, the decision would have been otherwise, for in a later case in the same court, decided in 1929,[1] the previous case was referred to and it was indicated that if the court had known that the property in question involved the premises of the Hungarian Legation, the decision would have been different.

---

[1] *Annual Digest 1927–8*, Case No. 103.

[2] *Ibid.*, Case No. 111.

The next class of states comprises those which do not afford immunity where the proceedings are in respect of some act on the part of a foreign state of a commercial or private nature. Belgium has already been noticed as coming within this category. The Egyptian Mixed Courts also apply the principle of partial immunity. In the case of *Rothschild* v. *Egyptian Government*[2] it was held (*Gazette des Tribunaux Mixtes*, Aug. 1925), by the Mixed Court of First Instance, and confirmed on appeal, that although the Mixed Courts are not competent to pronounce upon acts of sovereignty, those acts do not include contracts entered into by the government but only such acts as are reserved to the foreign Power in its sovereign capacity, such as the declaration of war, conclusion of treaties, &c. In *Borg* v. *Caisse Nationale d'Épargne Française*[3] the Civil Tribunal of Alexandria held (*ibid.*, 1926, p. 123) that the immunity from jurisdiction of a foreign state does not apply to its commercial enterprises which have the character of private acts, and that a foreign state when it carries out these transactions outside its own territory is deemed to submit itself to the jurisdiction of another state. The same principle was recognized in the case of the *National Navigation Co. of Egypt* v. *Tavoularidis* (*ibid.*, 1929, p. 251).[4]

---

[1] *Ibid.*, Case No. 251.

[2] *Annual Digest 1925–6*, Case No. 14.

[3] *Ibid.*, Case No. 122.

[4] *Annual Digest 1927–8*, Case No. 110.

Both Holland and France formerly recognized the principle of complete immunity, but have lately tended to depart from it. In the case of *The Union of South Africa* v. *Herman Grote*[1] in the District Court of Amsterdam in 1921 it was stated (*Nederlandsche Jurisprudentie* 1921, p. 849), that where the juridical acts at issue had no connexion whatever with the exercise of sovereign rights, the question ought to be decided in the sense that the foreign state is subject to the jurisdiction of the Dutch courts. On the other hand, the Dutch courts, like the Belgian, appear to apply to the full the principle of complete immunity from actual execution, see *Bergverksaktiebolaget Kosmai* v. *Militär-Liquidierungsamt of Vienna* (*Weekblad van het Recht*, August 8, 1921, No. 10750).[2] It may also be noticed that the Dutch courts do not regard a foreign state as having submitted to the jurisdiction merely by the fact of its having brought proceedings in the Dutch courts, see *Belgian State* v. *de Badts* (*Weekblad van het Recht*, January 22, 1923, No. 10978).[3]

In France also the principle of complete immunity was originally recognized, the principal decision being the judgment of the Cour de Cassation of January 22, 1849 (*Sirey* 49. 1. 81, *Dalloz* 49. 1. 5). Of late, however, the French courts have shown a tendency to depart from this principle. In the case of *Lakhowski* v. *The Swiss Federal Government and Colonel de Reynier*[4] the Tribunal de Commerce of the Seine held (see *Gazette du Palais*, 1920, Vol. II, p. 282) that the immunity of foreign states from jurisdiction existed only for acts done by them in a sovereign capacity, or administrative acts—acts of public authority. The court accordingly held itself competent. Its decision was reversed by the Court of Appeal of Paris (*Clunet*, Vol. XLV (1921), p. 179), but on another point, and the Court of Appeal stated that the distinction drawn by the Tribunal de Commerce between a political and a business act might be accepted. Again in *Société le Gostorg and U.S.S.R.* v. *Association France Export* (*Clunet*, Vol. LIV (1927), p. 406)[5] the First Chamber of the Cour de Paris held that:

> "Transactions of a commercial character extending to all fields can only be regarded as ordinary commercial transactions having nothing in common with the principle of the sovereignty of states."

Accordingly the court permitted the attachment of certain funds in the hands of the Soviet Trade Delegation in France in respect of a debt owed to a French company by the Soviet Government. It must be observed, however, that the *ratio decidendi* in this case appears to have been not so much the fact that a distinction could ordinarily be drawn between a state acting in a sovereign and in a commercial capacity, as that such a distinction could and must be drawn in the case of Soviet Russia owing to the fact that all trade in that country was a government monopoly. The same observation applies to a case which was heard before the Tribunal de Commerce of the Seine in 1927 (*Clunet*, Vol. LIV (1927), p. 680)[1] which also involved the Soviet Trade Delegation. The court held that the proceedings had not been taken against a sovereign state in its sovereign capacity, comprehensive commercial activities having no connexion with the principle of state sovereignty. It will be seen that none of the three cases just cited, all of which occurred since the War, is a direct authority for supposing that the French courts have abandoned the principle of complete immunity. They do, however, indicate a tendency in that direction. On the other hand, a case which was heard before the Tribunal Civil de la Seine (*Caratheodory* v. *The French State*, *Clunet*, Vol. LIV (1927), p. 400)[2] seems to show that the French courts still hold to the principle of complete immunity. Although in that case the proceedings were brought against the French State itself in the French courts, certain action which the French Government had taken in Turkey during the War involved consideration of the question of the immunity of states from the jurisdiction of foreign courts, and on this point the court held that a state was exempted from the jurisdiction of the courts of a foreign state not only in matters pertaining to the exercise of rights of sovereignty but also in regard to private contracts concluded by it with foreign subjects in a foreign country.

---

[1] *Annual Digest 1919–22*, Case No. 8.

[2] *Ibid.*, Case No. 86.

[3] *Ibid.*, Case No. 85.

[4] *Ibid.*, Case No. 83.

[5] *Annual Digest 1925–6*, Case No. 125.

Finally, there is the third class of states, those which appear to recognize the principle of complete immunity but in practice depart from it by drawing an inference of voluntary submission from facts other than a direct submission made in the face of the court itself. Greece and Austria have already been noticed as coming within this category, and, to a certain extent, Germany. Poland also comes within this class, if one may judge from a dictum of the Supreme Court of Poland in the case of *The Russian Trade Delegation at Warsaw* v. *Fajans* (*Zb. O.S.N.*—Collection of the decisions of the Polish Supreme Court—I, 1928/1, No. 28)[1] to the effect that

---

[1] *Annual Digest 1927–8*, Case No. 15.

[2] *Annual Digest 1925–6*, Case No. 124.

> "Although both in theory and in the judicial practice of certain states it is an accepted view that a state as an entity which is sovereign and the equal of other states, may not be sued before a foreign court unless it resigns that immunity, yet that problem does not arise in the present proceedings, *for apart from the question whether the U.S.S.R. had not, by the very fact of taking up commercial activities in Poland, submitted altogether to the jurisdiction of Polish courts in all disputes arising in Poland from those activities*, . . . the Union, by having started judicial proceedings against a local citizen in the matter of a claim, had by that very act recognized the jurisdiction of the Polish Court in this case."

The words *italicized* seem to indicate that a voluntary submission is to be implied from the fact of entering into commercial activities. However, here again it is not clear whether this view was not taken purely owing to the fact that it was the Russian Trade Delegation which was involved, and on the ground that in Russia all trade is a government monopoly. It may be that in regard to an ordinary state a different view would have been taken.

The only remaining country to be dealt with in this analysis is Italy, which is usually regarded as being, with Belgium, an outstanding example of a state of the second class, namely, those which draw a distinction between actions of a sovereign and a non-sovereign nature. While in practice the conduct of the Italian courts amounts to this, it seems that technically their decisions are based rather on a wide construction of the notion of voluntary submission than on the theory that any clear distinction can be drawn between the various acts of a foreign government; and that in consequence Italy properly belongs to the third class. Thus, in the case of *The Russian Trade Delegation* v. *Tesini and Malvezzi* (*Foro Italiano*, Vol. I (1925), Col. 830–6)[2] the Italian Court of Cassation held that the Italian tribunals have no jurisdiction over foreign states except in cases where the foreign states themselves renounce their jurisdictional immunity. Such a renunciation was to be implied when the foreign state invoked that jurisdiction by bringing an action before an Italian tribunal or where it embarked upon commercial or industrial activities on Italian territory. Such a renunciation was further to be assumed from the activities of the Russian State by its carrying on, in the form of a monopoly, its commerce in Italy. Similarly, in the case of *The French Government* v. *Serra* (*Rivista di Diritto Internazionale* (1925), pp. 540–5)[3] the Court of Appeal of Genoa held that the

---

[1] *Annual Digest 1927–8*, Case No. 108.

[2] *Annual Digest 1925–6*, Case No. 127.

[3] *Ibid.*, Case No. 128.

Italian judicial authority had jurisdiction in regard to actions brought against a foreign state in connexion with a contract of private law to be performed in Italy. Again, in a case heard by the Court of Appeal of Naples, involving the United States Shipping Board (*Monitore dei Tribunali* (1926), pp. 336–7)[1] it was held that a foreign state, which in its capacity as a subject of private law becomes in Italy a party to an ordinary private law contract, is bound to recognize the jurisdiction of the Italian tribunals in all possible disputes connected with that contract. And, in the case of *Nobili* v. *The Emperor Charles I of Austria* (*Giurisprudenza Italiana*, Vol. I (1922), pp. 1, 472),[2] the Court of Cassation of Rome held that the proceedings did not relate to acts done by the Emperor of Austria as head of his own state but had their origin in contracts and acts of a private nature which arose in Italy. Consequently, the court refused to recognize any immunity.

It seems clear from these decisions that the principle upon which the Italian courts act is that of voluntary submission or rather of waiver of immunity. Certain acts, and in particular the fact that a foreign state engages in trade in Italy or enters into a private contract in Italy or to be performed in Italy, are considered by the Italian courts as implying a waiver of immunity or as involving an implied consent that the Italian courts should have jurisdiction.

It has already been observed that in one further respect Italy goes farther than any other country, inasmuch as Italian law apparently permits of the actual levying of execution against the property situated in Italy of a foreign government in respect of any judgment given against it in the Italian courts and provided the property is not such as is specifically necessary to the exercise of the state's sovereign functions, e.g. embassy premises or public vessels.[3]

II

The foregoing analysis, which includes most of the states having specially advanced systems of jurisprudence, indicates a very considerable divergence in the practice of nations on this subject, not only on matters of broad principle, but also on a number of minor points. Applying the rule, therefore, that international law depends on the practice of states, it is clear that international law on this question must be regarded as uncertain. This uncertainty is also reflected in the writings of publicists, who are fairly evenly divided, some in maintaining the doctrine of complete immunity, others in drawing a distinction between various classes of state acts. It is worth noticing, also, that at its meeting of 1891 the Institute of International Law adopted resolutions departing widely from the principle of complete immunity except in cases of voluntary submission and indicating a number of cases in which a foreign state could properly be made the subject of proceedings in local courts. However, although these resolutions were adopted over forty years ago, they do not appear to have been acted upon with any consistency. Again, in regard to that part of this question which relates to the immunity of state-owned vessels, a convention was, after long preparatory work, signed at Brussels in 1926, embodying the general principle that ships operated or owned by governments for commercial purposes should be subject to ordinary maritime law and should not enjoy immunity from proceedings in foreign courts. This convention has, however, never been ratified and is not in force.

---

[1] *Ibid.*, p. 179.

[2] *Annual Digest 1919–22*, Case No. 90.

[3] See Walton, *Journal of the Society of Comparative Legislation*, 1920, 3rd series, Vol. II, p. 256; and Garner in *B.Y.B.*, 1925, p. 139.

It remains, therefore, to discuss the matter in its theoretical aspects. The principal arguments advanced in favour of distinguishing between the sovereign and non-sovereign acts of a foreign state and of refusing immunity in regard to the latter are as follows. It is said in the first place that the doctrine of complete immunity was evolved at a period when states normally acted only in a political and sovereign capacity, and that in consequence this doctrine, in so far as it is now applied in its full rigidity, is a survival from an obsolete state of affairs. It is alleged that of recent years, and particularly since the War, there has been an increasing tendency on the part of states to carry on activities of a non-political character, and in particular to engage in trade and commerce. To such a point has this been pushed that in certain states, e.g. Soviet Russia and, to a lesser extent, Persia, the whole business of trading has been converted into a government monopoly. In other states, such as the United States of America and Latvia, particular activities, such as shipping, are carried on by the government in precisely the same way as by an ordinary private citizen. It is further pointed out that, although diplomatic immunity is extended to persons belonging to the suite of an ambassador or diplomatic agent, an exception is often made in regard to such persons if they engage in trade on their own behalf, and it is asked why a similar exception should not be made if an ambassador himself or his sovereign or the state or government to which he belongs should similarly engage in commercial activities. The immunity of the state, it is said, is based on its attribute of sovereignty. If, therefore, a state chooses to act in a non-sovereign capacity and in the same manner as a private person might do, it is no longer entitled to immunity, or at any rate it must be considered by its action to have waived its immunity and to have consented to be treated as a private entity. In other words, a state cannot purport to act as a private individual and yet at the same time seek to take advantage of its sovereignty whenever such action turns to its disadvantage. Attention is also drawn to the apparent injustice created by a situation in which a foreign government is admittedly entitled to sue as plaintiff and to bring proceedings in any court outside its own country, and yet cannot itself be sued or have proceedings taken against it in any courts except its own.

These arguments are weighty, but it is submitted that the arguments on the other side and in favour of maintaining integrally the doctrine of complete immunity are no less strong. It is, of course, true that there has recently been a tendency on the part of states to engage in trade. Except, however, in one or two cases of an exceptional nature, such as Soviet Russia, it may fairly be said that this tendency has already passed its peak. It was in the main an outcome of the War and of the fact that during that time the governments in the principal belligerent countries assumed and carried on many activities which in time of peace were exercised exclusively by private citizens. It seems reasonable to suppose that in the future, in so far as trade and commerce pass out of the hands of private citizens or companies, they will devolve on public utility corporations which, although of a public or semi-public nature, will not be governmental organs and will be liable to be sued in the ordinary way. There is no indication that the system of making a state monopoly of trade, such as obtains in Russia, is likely to spread much farther. The commercial activities of states arising out of the War are rapidly being wound up. In so far as states may continue to carry on isolated enterprises (such as the United States Shipping Board), they will probably, as does the United States, be willing to waive their immunity. In regard to those states which do carry on a trade monopoly, the position can be regularized by means of bilateral treaties.

It is in the second place significant that, with the exception of

Italy and, to a lesser extent, Czechoslovakia (see above), even in those states where proceedings are permitted in respect of the non-sovereign acts of foreign governments, it is not possible to proceed to actual execution without the consent of the foreign state concerned. In those countries, therefore, the case is one of a right without, in the last resort, a remedy. In regard to this objection it is urged that, notwithstanding the absence of an effective remedy, the moral effect of a judgment is considerable and that the public conscience in the foreign state concerned would not allow it to repudiate the judgment. It is observed that most governments allow themselves to be sued in their own courts, and that although here again there is no effective way of enforcing the judgment, most governments do in fact satisfy any judgment rendered against them. Practice has shown, however, that this view is misleading. It is true that states habitually satisfy judgments given against them in their own courts; that is because, in the first place, in such cases the public conscience would indeed make it impossible not to satisfy those judgments, and because, in the second place, the state has itself directly or indirectly consented or allowed itself to be sued, and consequently has no reason to refuse to satisfy a judgment given against it by its own tribunals. The situation is entirely different in regard to judgments given against a state in a foreign court and without its consent or submission. In such cases states habitually, or at any rate very frequently, entirely ignore the foreign proceedings and the judgment rendered, and the public conscience at home is rather apt to applaud this action than otherwise. Particularly do those countries, such as the United Kingdom and the United States, which afford complete immunity to foreign governments from proceedings in the local courts, refuse to recognize any judgment rendered against them abroad. To attribute any sort of efficacy to such a judgment therefore, moral or otherwise, is quite misleading. If it be urged that in that event states should go farther and not only permit proceedings in respect of non-sovereign acts, but also proceed to enforce by way of execution any judgment given against foreign governments in such proceedings, the answer is that in practice measures of execution will rarely if ever be possible. It is probable that, even in Italy, and whatever may theoretically be permitted by local law, it would in practice be virtually impossible to enforce against a resisting foreign government a judgment given against it in the local courts.

It is submitted that the fact that judgments rendered against foreign states cannot in practice be enforced without the consent of the state concerned, and that they are, moreover, virtually without even a moral effect, indicates that there is a fundamental weakness in the doctrine which seeks to draw a distinction between various classes of state acts. The truth is that a sovereign state does not cease to be a sovereign state because it performs acts which a private citizen might perform. Consequently, any attempt to make it answerable for its actions, of whatever kind, in courts other than its own courts is inconsistent with its sovereignty, and this inconsistency is made evident by the complete ineffectiveness of the judgments rendered.

It is of course the fact that although, according to the strict doctrine, states cannot be sued in foreign courts, they are always entitled themselves to bring proceedings there. But the argument that this is inequitable and one-sided overlooks the true reason for which states are enabled to take proceedings in a foreign court. This reason is none other than an application of the ordinary rule of private international law that, generally speaking and in regard to actions *in personam*, the proper forum in which to sue is that of the defendant, i.e. that in which he is resident or domiciled. Even in actions of a purely private character between private individuals, it is normally impossible for a plaintiff to take proceedings in his own courts unless they happen also to be the courts of the defendant. Usually he has to seek justice in the courts of the defendant's domicil or residence. In the same way states or governments seeking justice against a private citizen or company do so in the forum of the defendant. It follows that, on the same basis, foreign plaintiffs should apply, as against governments other than their own, the same rule which would be applicable if they were suing a private citizen or company having a residence or domicil abroad. Just as it is normally not possible for a plaintiff to sue a private person in the plaintiff's courts unless they are also the courts of the defendant, so also there is no reason why he should be able to sue a foreign government in an action *in personam* in any courts but the courts of that government. In almost every country governments allow themselves to be sued in their own courts, and there is normally no reason to suppose that the standard of justice in such proceedings is any lower than that which obtains in the same courts in proceedings between private parties. It is sometimes said that unless private persons can sue foreign governments in their own local courts (i.e. in the courts of the plaintiff) they have no remedy except a remedy through the diplomatic channel. This is, of course, not the case, for almost always they have a remedy in the courts of the foreign state concerned, with the additional possibility of representations through the diplomatic channel if such proceedings should fail to result in justice being done. The interests of plaintiffs are, therefore, normally fully protected, and they gain little by being able to bring proceedings in their own courts, since such proceedings can always be ignored by the foreign government involved, and execution in respect of them can be resisted.

This question of the ability of plaintiffs to bring proceedings in the courts of the government which they desire to sue is thrown into relief by the practice of states in regard to proceeding against foreign governments not *in personam* but in respect of real property. It has been observed that in almost every state, even those which apply the strict doctrine of complete immunity, an exception is made not only in cases of actual voluntary submission but also in cases where the subject-matter of the action consists of real property situated within the jurisdiction of the court. It is not certain whether such an exception would be made in the United Kingdom. No case appears ever to have arisen. This is no doubt because, as in so many other countries, it is a matter of extreme difficulty for a foreign government as such to own real property in this country. Even where foreign governments are interested in real property, they usually act through some separate entity, such as a bank or other corporation, which is liable to be sued in the ordinary way. The cases in which foreign governments are concerned with real property outside their own country are, therefore, rare, and the exception which is made in regard to proceedings involving such property is a reasonable one, particularly as it is equally an application of the ordinary rule of private international law that in any matter concerning the title to real property, jurisdiction is vested solely in the courts of the country in which the property is situated. In regard to real property situated in his own country, therefore, a private citizen is not called upon to take proceedings in the forum of the defendant, for, if he does so, that forum will normally refuse to hear the proceedings on the ground that it cannot render an effective judgment therein. The plaintiff must, therefore, have recourse to his own courts if the property is within their jurisdiction. In the same way if the plaintiff were to sue a foreign government in the courts of that government in respect of property situated in the plaintiff's own country, those courts would normally declare themselves to be incompetent. In such a case, therefore, the plaintiff would have no remedy at law at all unless he were able to sue in the courts of his own country, and it is consequently reasonable that he should be able to do so. Moreover, in so far as any judgment of a local court against a foreign government can be rendered effective at all, it can be rendered effective against real property situated within the jurisdiction of the court.

Finally, attention may be called to the extreme difficulty of drawing any satisfactory theoretical distinction between one class of state acts and another. It is usually held to be a matter of importance that the law should at least be certain if not perfect; but any distinction drawn on the vague ground of what is and what is not a sovereign act must necessarily in many cases render it completely uncertain whether a state can be sued or not. In this respect it is noticeable that the distinction between sovereign and non-sovereign acts breaks down in the very cases in which it is most desired to apply it. It is usually said that a sovereign act is an act which only a government can perform and that a non-sovereign act is any act which any private citizen might have performed. In a country such as Soviet Russia, however, private citizens are forbidden by law to perform acts which in other countries private citizens can normally carry out. All commercial activities are by law government monopolies and are carried out by virtue of the state's *imperium*. It is, therefore, clear that whenever the Russian Government or one of its trade delegations enters into a commercial transaction, it is acting in virtue of its *imperium* and is performing a sovereign act, at any rate in the sense of an act which under Russian law only the State can perform and which private Russian citizens are forbidden to carry out. It seems to follow, therefore, that even in those countries where a distinction is drawn between sovereign and non-sovereign acts, the Soviet Government could not properly be sued in respect of any commercial activity. Yet this is the very type of case which the distinction in question was intended to meet.[1] To take another example, it will be remembered that in the Belgian case quoted at the outset of this article, the court came to the conclusion that the Greek Government had acted in a sovereign capacity because the damage alleged to have been done to the plaintiffs had resulted from a Greek legislative decree. Yet if it be admitted that one of the tests of whether an act is of a sovereign character is whether it was effected by some public legislative act or decree, it is clear that means will always exist by which an action which is essentially of a commercial character can be converted into a sovereign act. It is true that states may enter into private contracts, but there is nothing to prevent them doing so by means of actions which are indistinguishable in their form from legislation. Moreover, if a state chooses to break a contract, it has only to do so by means of some legislative act or executive decree for its breach of contract to become a sovereign act unchallengeable in any court.

---

[1] This difficulty has been got round in several of the cases cited above (see pp. 114–17) by the legal fiction (or sophistry) that a state which institutes a monopoly of foreign trade thereby voluntarily submits to the jurisdiction of foreign courts—a notion devoid of all soundness.

It is submitted, therefore, that the distinction between the sovereign and non-sovereign acts of a state is arbitrary and unreal, and one which is not easy to apply in practice and which might become very much more difficult to apply if states cared to take the appropriate measures; one which, moreover, must always leave a sort of no-man's land of actions capable of being regarded as coming within either category. The conclusion seems to be that the only sound course is to adhere to the strict doctrine of complete immunity, any departures from it in specific cases being regulated by international convention.

It is at any rate clear that the doctrine of partial immunity, in so far as it is of any effect at all, owes its effectiveness only to the willingness of the foreign state involved to satisfy the judgment, a willingness which is normally forthcoming only in exceptional circumstances. This in itself involves a contradiction in terms, since the basis of the doctrine of partial immunity is that in certain cases states may be sued whether they wish or no. The truth is that states can never be *effectively* sued against their will. This is due to their attribute of sovereignty, which they retain whatever the nature of the act done by them.

BOYCOTT IN INTERNATIONAL RELATIONS

By H. LAUTERPACHT, LL.D.

I

THE Report of the Lytton Commission appointed by the Council of the League of Nations to inquire into the dispute between China and Japan contains a long chapter on the boycott of Japanese goods by China as one of the essential factors of the dispute.[1] The Commission found that although the boycott had its origin in a spontaneous popular movement it was organized and largely directed and controlled by a powerful party closely associated with the Government. It also questioned whether the Chinese Government could be absolved from responsibility both for isolated acts of direct support of the boycott movement by governmental departments and for indirect assistance as the result of the failure to suppress acts punishable under Chinese law. On the question of responsibility for the boycott movement as a whole the Commission showed some degree of hesitation. It did not deny the right of individual Chinese to decline to have commercial relations with Japanese subjects or to make propaganda, in a lawful manner, for the idea of the boycott. At the same time the Commission preferred to dissociate itself from any intention of pronouncing authoritatively on the subject. In doing so, it seemed to imply that it is controversial from the point of view of international law whether "the organized application of the boycott to the trade of one particular country is consistent with friendly relations or in conformity with treaty obligations".[2] Accordingly, the Commission expressed the hope that "in the interest of all states, this problem should be considered at an early date and regulated by international agreement".[3] It will be submitted in the present article that the matter is already covered by existing principles of state responsibility and by rules of international law relating to the treatment of aliens; that the creation of a specific international delinquency in connexion with the boycott of foreign goods is not feasible in practice; and that, even if it were practically possible, it is not desirable that it should be introduced.

---

[1] League of Nations. Appeal by the Chinese Government. *Report of the Commission of Inquiry*, Doc. C, 663, M. 320, 1932, VII, pp. 112–21.

[2] *Op. cit.*, p. 120. Apparently the Commission had in mind treaty obligations of ordinary commercial treaties.

[3] *Ibid.*, p. 120. The Report of the Assembly under Art. 15, para. 4—a report which embodied the substance of the Report of the Commission of Inquiry—did not make the matter clearer. It stated (on p. 17) that "the use of the boycott by the Chinese previous to the events of 18 September, 1931, to express their indignation at certain incidents or to support certain claims could not fail to make a situation which was already tense still more tense", but that "the use of the boycott by China, subsequent to the events of 18 September, 1931, falls under the category of reprisals". While the first statement refers to the "Chinese" the second refers to China. If the word "reprisals" is used in its technical sense—and there is a strong presumption that this is the use of a term in an

The participation of the population of a state in matters of foreign policy by means of refusal of commercial intercourse, in particular of purchase of goods[1] coming from a foreign state charged with an unfriendly attitude, is not a new phenomenon in international life. It is a weapon which has been resorted to on a number of occasions in the last thirty years. It was used in 1908 by large parts of the population of Turkey as a protest against the annexation of Bosnia and Herzegovina by Austria-Hungary.[2] In 1909 there was a boycott in Turkey of Greek goods in order to induce Greece to abstain from assisting the Cretan insurrection.[3] Since 1924 there have taken place in Egypt sporadic attempts to boycott British goods. However, it is in China that the practice and the technique of boycott have developed with particular intensity and frequency. In China the boycott has for a long time been almost a national institution. The existence in that country of disciplined guilds of merchants capable of being used as a directing, co-ordinating, and enforcing agency has tended to

---

international instrument of this importance—then the statement would imply that, at least since September 18, 1931, the Chinese Government was responsible for the boycott; that the boycott was contrary to international law; and that if, subsequent to September 18, 1931, the boycott could not be regarded as contrary to international law this was only on account of the illegality of the Japanese action. It is doubtful whether it was the intention of the Assembly to commit itself to the view of the initial illegality of the boycott. The confusion is probably due to the manner in which China presented her case. See *Memorandum on the Boycott*, presented in June 1932, to the Lytton Commission. While arguing that under international law no responsibility attached to the Chinese Government for the acts of boycott, the author of the *Memorandum* insisted that the boycott was in the nature of reprisals which had been rendered legitimate by various Japanese acts in Corea, Manchuria, and Shanghai (see pp. 26–31 of the *Memorandum*).

[1] The refusal to buy goods is the principal but not the only manifestation of boycott. The recent Chinese boycott directed against Japan included the following measures: (*a*) refusal to purchase, use, or carry Japanese goods; (*b*) refusal to use Japanese ships, banks, or warehouses; (*c*) refusal to offer labour or services to Japanese subjects; (*d*) refusal to supply Japanese subjects with foodstuffs and other necessities of daily life; (*e*) abstention from social intercourse with Japanese subjects. See on the methods and scope of this boycott *Supplementary Documents to the Report of the Lytton Commission*, Part III, Study No. 8, pp. 220 *et seq.* See also *British Encyclopaedia* for the origin of the term "boycott".

[2] For details of this boycott see Laferrière in *Revue Générale de Droit International Public*, XVII (1910), pp. 301–9. See also Baty, *International Law* (1909), pp. 66–70.

[3] See Laferrière, *loc. cit.*, pp. 309–11.

constitute the boycott a weapon of considerable efficiency. The weak position of China in the international sphere, combined with the policy of pacific penetration on the part of foreign Powers and their insistence on obtaining special privileges in Chinese territory, has been an additional factor in constituting the boycott a weapon of national action. In 1905 the restrictions upon Chinese immigration into the United States called forth a commercial boycott of the United States.[1] In 1908 Japanese goods were boycotted when, as the result of the apparently justified seizure of the Japanese steamer *Tatsu Maru* suspected of smuggling, the Chinese Government was compelled to offer apologies and to pay compensation. In 1915 the Japanese ultimatum to China, presented in the form of the well-known twenty-one demands, resulted in another boycott. The same instrument was used in 1923 in order to induce Japan to restore to its original term the lease of the Kwantung Territory prolonged as the result of the twenty-one demands. In 1925 a disturbance, in which a number of Chinese were killed or wounded by a police detachment commanded by a British officer, in the course of a labour dispute at Shanghai, brought about a widespread boycott of British and Japanese goods in China. In 1927 and 1929 there followed further boycotts in connexion with the dispatch of Japanese troops to Shantung. What has been described as "the most extensive, best organized and probably most efficient movement of its kind"[2] is the boycott launched in 1931 following upon the massacre of a number of Chinese in Corea. That movement, which has had an unprecedented accession of strength as the result of the occupation of the three Manchurian provinces and of Jehol, is still in unabated vigour at the time of writing.

II

As a matter of broad principle, it is difficult to see how a state can be made internationally responsible for the private boycott of the goods of a foreign country. This principle is subject to the qualification—part of which is, as we shall see, controversial—that the boycott does not originate with the government, that it is not supported by it directly or indirectly, and that nothing is done in pursuance of it which results in the disregard of the state's international duty to respect and protect the life and property of aliens. Subject to these qualifications the proposition is too obvious to require detailed elaboration. As a matter of international duty, a government cannot be expected to dictate to private individuals from whom they shall buy the goods they need. The position might be different if a state undertook in a treaty to guarantee to the other contracting party, now affected by the boycott, that a definite quantity or proportion of goods would be purchased from it. An ordinary treaty of commerce and establishment does not, of course, have this effect. It provides the legal basis and guarantees of commercial intercourse on the assumption that the subjects of the contracting parties will be prepared to enter into such intercourse with one another.

---

[1] For the diplomatic correspondence relating to this boycott see *U.S. Foreign Relations*, 1905, pp. 204–34.

[2] For details of this and other Chinese boycotts see *Supplementary Documents to the Report of the Commission of Inquiry*, Study No. 8, pp. 212–17. And see Fauchille, *Traité de droit international public*, Vol. I (1926), Nos. 985(1)–985(5), for an account of numerous instances of boycott.

Undoubtedly, a government may go beyond its international duties and suppress acts of private individuals which threaten to disturb international relations by embroiling it with a foreign state. The municipal law of various states abounds in examples of this nature. The British Foreign Enlistment Act of 1870[1]—by prohibiting enlisting in the service of the belligerent and the supplying of coal and provisions to a belligerent fleet—goes much beyond the duties of neutrality which international law imposes upon a state. The criminal law of many countries prohibits high treason and revolutionary propaganda against foreign states although no such duty of repression is laid down in international law.[2] Some municipal systems punish acts which may embroil the state with foreign states[3]—thus adopting a criterion which is more political than legal. For a state, especially a weak state, may become embroiled with foreign states on account of events for which there is normally no responsibility in international law.

---

[1] 33 and 34 Vict., c. 90.

[2] According to Art. 102 of the German Penal Code persons committing in Germany against a foreign state an act which if committed against Germany would be punished as high treason within the meaning of the Penal Code shall be liable to imprisonment for a period up to ten years. A Decree promulgated on February 25, 1927, in Soviet Russia described as anti-revolutionary crimes acts directed against a state of workers even if that state does not belong to the Union of Socialist Soviet Republics.

[3] See, for instance, Arts. 84 and 85 of the French Penal Code; Art. 113 of the former Italian Criminal Code; Art. 41 of the Swiss Criminal Code. And see *R.* v. *Peltier* (1803), 28 *State Trials*, p. 529, to the effect that publications tending to degrade, to revile, and to defame persons "in considerable situations of power and dignity in foreign countries" are calculated to embroil this country with foreign Powers and may, therefore, be treated as libels. See also *R.* v. *Vint* (1799), 22 *State Trials*, p. 627. But see Phillimore J. in *R.* v. *Antonelli and Barberi* (1905), 70 J.P. 4.

Also, a state may deem it wise to suppress a movement which although in itself not giving rise to international responsibility may lead to acts for which the state bears responsibility. In 1905 the United States, in protesting against the boycott, drew the attention of the Chinese Government to the possibility of the acts of boycott assuming the dimensions of attacks against the life and property of aliens.[1] The non-suppression of a boycott may possibly be regarded as a failure to use due diligence to prevent the subsequent losses of life and property of aliens and may therefore give rise to international responsibility. But it is clear that in such cases the toleration of the boycott is not a specific international wrong, just as the toleration of propaganda against or criticism of a foreign state do not in themselves constitute a separate international delinquency.

Such practice of states as exists on the matter cannot be regarded as disproving the somewhat obvious view set forth above.[2] When protesting in 1905 against the boycott of their goods in China the United States seemed to assume the existence of a wider duty than the one here defined. However, a study of the correspondence suggests that on the whole the protest of the United States was based on the alleged support of the movement by the Chinese Government[3] and officials, and also, as shown, on the apprehension that the boycott might lead to disturbances of a serious character. In so far as the complaints of the United States went beyond these demands their attitude was one which, it may safely be assumed, they would not have tolerated had the rôles been reversed.[4] During the boycott of Austro-Hungarian goods in Turkey in 1908 Austria-Hungary complained not on account of the boycott as such but because the usual port facilities were withheld from Austrian shipping, because Turkish customs officials refused to handle Austrian goods, and because no action was taken against persons forcibly preventing intending customers from entering Austrian stores.[1]

---

[1] "We have long realized the gravity and even the danger of the situation and endeavoured to bring your government to a sense of the perils involved in permitting the growth of the anti-foreign sentiment, which, ostensibly limited to a single phase of China's relation to an outside Power, is ready to overleap all bounds and to lead at any time to the recurrence of the dreadful atrocities of Lienchow"—Secretary Root to the Chinese Minister, November 14, 1905; *U.S. Foreign Relations*, 1905, p. 232.

[2] See, to the same effect, Laferrière, *loc. cit.*, pp. 310–26; Baty, *op. cit.*, p. 70; Hyde and Wehle in *American Journal of International Law*, Vol. XXVII (1933), pp. 1–4.

[3] See *U.S. Foreign Relations*, 1905, pp. 214, 223. In the course of the correspondence the Chinese Government expressed the view that the boycott would never have taken place but for the United States immigration laws which the Chinese people regarded as oppressive. The United States Minister felt justified in inferring from this statement that the boycott movement had a certain amount of sympathy from the Chinese Government.

[4] The United States Minister referred to "an unwarranted attempt of the ignorant people to assume the functions of government and to meddle with international relations" (*op. cit.*, p. 223).

The view has been stressed so far that so long as the state as such is not connected with the boycott movement by way of initiating it or by supporting it directly or indirectly, its responsibility is not involved. But does not even this qualifying admission of state responsibility go too far? Is there a good reason for assuming that, in the absence of a commercial treaty and without infringing the rules of international law as to the protection of the life and property of aliens, a state is liable for initiating and supporting a boycott of goods from another country? It is difficult to see on what grounds international responsibility could in such cases be based. In the absence of explicit conventional obligations, particularly those laid down in commercial treaties, a state is entitled to prevent altogether goods from a foreign state from coming into its territory. It may—and frequently does—do so under the guise of a protective tariff or of sanitary precautions or in some other manner. The foreign state may treat such an attitude as an unfriendly act and retort accordingly. But it cannot legitimately regard it as a breach of international law.

The further question must be asked: What is the position pending the duration of a commercial treaty? Is the responsibility of the state involved if a government bound by a commercial treaty, while conforming with the rules of international law relating to the respect for the life and property of aliens and while placing no legal or administrative obstacles in the way of foreign goods, at the same time makes it clear that it approves of the boycott as a measure of justifiable national action and even promotes the boycott in various ways? The Lytton Commission of Inquiry found that the boycott of Japanese goods in China was promoted, *inter alia*, by slogans printed on currency notes and on letters and telegram-forms.[2] This was a direct form of governmental assistance. It has been submitted that such and similar assistance is not necessarily contrary to the duties of customary international law in regard to the treatment of aliens and their property. Aliens are not by international law entitled to absolute equality of rights as compared with nationals. They are entitled to an equal protection of such rights as they possess.

---

[1] See Austrian note of December 14, 1908, in Laferrière, *op. cit.*, p. 317.

[2] *Report of the Commission*, p. 116.

But they do not enjoy all the rights which are enjoyed by nationals. Does the existence of a commercial treaty make a difference? Or does the answer to the question depend upon the content of the relevant provisions of the commercial treaty? A survey of treaties of commerce shows some variations in the relevant provisions. The treaty of commerce between the United States and China of 1858 (to which the United States frequently appealed in the course of the boycott in 1905) laid down in Article 15 that

> "at each of the ports open to commerce, citizens of the United States shall be permitted to import from abroad and sell, purchase, and export all merchandise of which the importation is not prohibited by the laws of the Empire".

The treaty of commerce and navigation between China and Japan of July 21, 1896, provides in Article 4 that

> "Japanese subjects may, with families, employees and servants, frequent, reside and carry on trade, industries and manufactures or pursue any other lawful vocations in all the ports, cities and towns of China, which are now, or may hereafter be, opened to foreign residence and trade".

The terms of other treaties of commerce and navigation are wider. Thus the treaty of December 2, 1924, between the United Kingdom and Germany provides in Article 1 that

> "the subjects or citizens of each of the two contracting parties shall have liberty freely to come, with their ships and cargoes, to all places and ports in the territories of the other to which subjects or citizens of that contracting party are or may be permitted to come, and shall enjoy the same rights, privileges, liberties, favours, immunities and exemptions in matters of commerce and navigation as are or may be enjoyed by subjects or citizens of that contracting party".

The treaty of commerce between the United Kingdom and the United States of July 3, 1815, provides in Article 1, *inter alia*, that

> "the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce".

Is the fulfilment of obligations under these and similar provisions compatible with the open encouragement and support of a boycott movement by the government of a state? The commercial treaty obviously implies that the state cannot prohibit generally the importation and sale of goods coming from the territory of the other contracting party. But does it mean that it may not exhort its citizens not to buy the goods of the state with which it has a commercial treaty and that it must not place its governmental departments at the disposal of the boycott propaganda? It may be and has been argued that the protection and granting of equal favours relates only to such goods as have been actually imported and to such commercial intercourse as has in fact materialized; that the provisions of the commercial treaty do not imply the duty of commercial intercourse, but merely favourable treatment of such intercourse as actually takes place; and that by the conclusion of a commercial treaty states do not intend to abandon generally their freedom of action in matters of commerce.[1] These arguments cannot be accepted as containing a fair interpretation of commercial treaties. If a state promises to another state to grant to its merchants "complete protection and security for their commerce" then it ill becomes it to exhort its citizens to suppress such commerce and to make its governmental services available for propaganda to this end. By no stretch of interpretation could such an attitude be squared with the undertaking to confer upon foreign merchants the same "privileges, liberties and favours" as are enjoyed by the state's own citizens. The same, it is believed, applies to treaties such as the above-quoted commercial treaties between Japan and China or the United States and China, in which the provisions of the treaty are merely of a permissive character. It is submitted that the only way left open in such cases to a state determined not to put itself in conflict with its treaty obligations is either to denounce the treaty if this is possible[2] or else to trust that the patriotic sentiment of the population favouring the boycott will assert itself without governmental aid.

This view seems to be substantiated by some of the diplomatic correspondence on the matter, which shows a tendency to dissociate the governments in question from the boycott. In the actual conduct of boycotts governments have been equally anxious to do nothing which might enable a foreign state to charge them with active participation in the boycott. In the extended anti-Japanese boycott in China since 1931 diligent researches have produced only four not very persuasive instances of governmental participation or condonation.[3]

---

[1] This is to some extent the view of Hyde and Wehle, quoted above.

[2] It will be noted that the state's freedom of action is less hampered by commercial treaties than is generally assumed. Treaties of commerce are as a rule liable to comparatively short notice; commercial treaties concluded without any fixed time limit are probably terminable at reasonable notice by one of the contracting parties.

[3] These instances are enumerated in the above-mentioned Study No. 8 (*Supplementary Documents to the Report of the Commission of Inquiry*, pp. 230–2). One referred to a secret document issued by the President of the Executive Yuan (one of the chief government departments) transmitting to the municipal and provincial authorities the Kuomin-

The fact that the responsibility of the government as such for participating in the boycott is to some extent a matter of controversy constitutes an additional reason for proceeding cautiously in attributing to a state responsibility for acts of bodies and individuals more or less closely associated with it. What is meant by the state in connexion with this and other instances of state responsibility? The state means the government and other organs of the state regardless of rank and position in the state hierarchy. It extends from the government to the lowest official in a provincial post office or to a private in the army or to an ordinary seaman in the navy[1]—the only difference being that the responsibility of the former is direct whereas in regard to the latter the state is responsible only if it does not disavow and remedy the injurious action. The same applies to a large extent to private bodies in receipt of governmental financial assistance. The activities of such bodies do not directly engage the responsibility of the state, but the foreign state is entitled to expect that the government will make continued financial support dependent upon the cessation of activities which if conducted by the government as such would create international responsibility on the part of the state.

But what is the position in regard to bodies closely associated with the government but not in receipt of direct financial assistance from the resources of the state? The problem involves such questions as the responsibility of the Russian Government for the activities of the Communist Party, or of the Italian Government for the activities of the Fascist Party, or of the Government of China for the activities of the Kuomintang. In countries like these the composition and the activities of the government are to a large extent influenced by the party actually wielding the supreme

---

tang plan of action against Japan. The document transmitted contained no reference to the boycott (see *op. cit.*, p. 218). The second was a circular of the Chinese Minister of Railways to the administrations of some Chinese railways referring to the necessity of bringing about "at any price the rupture of economic relations with Japan" and exhorting the railways to take effective measures for promoting the national industry by granting facilities to the transport of Chinese goods. The third document was a minute issued by the Chinese Ministry of Communications and informing those concerned of a resolution passed by a mass meeting at Nanking and pointing to the necessity of recovering the right of coastal navigation by refusing to board Japanese steamers. The fourth instance was the registration by the Chinese Ministry of Industry and Agriculture of two trade-marks with anti-Japanese slogans.

[1] In March 1921 the American military authorities in Boston prohibited men in uniform from taking part in a demonstration organized by the American Association for the Recognition of the Irish Republic. See Stowell, *Intervention in International Law* (1921), p. 383.

power in the state. Although in such cases the government and the party behind the government are frequently indistinguishable, it is extremely doubtful whether the state can be made responsible for the acts of the party. In most states the composition of the government and, frequently, its acts, are determined by one or more parties which command a majority in the legislative assemblies and which either as a matter of constitutional machinery or of actual fact have a distinct place in the working of the government. To make the latter responsible for the acts of the party would mean to play havoc with the established rules of state responsibility. The standards of restraint and mutual respect in intergovernmental relations are more rigorous than in the relations of individuals. To require the same standard from private persons and associations would mean to expect from them a degree of diligence and restraint which may be in excess of that required from them in relation to their own government. Rules of international law on the matter of state responsibility are based on the separation of the state from the individuals and associations of which it is composed. This may at times enable a state to do through individuals and private bodies what it is not allowed to do itself. But the advantages of this state of affairs have, in the present stage of international organization, been found greater than the concomitant disadvantages of the possibility of evading international duties. In any case this is the present position of international law. The fact that a boycott is directed and controlled by a political party associated with, influencing, and, possibly, appointing the government is not sufficient to saddle the state with international responsibility.[1]

III

Direct participation in and encouragement of a boycott does not exhaust the range of state responsibility. The international responsibility of a state may become engaged if it furthers indirectly the boycott movement by failing to enact adequate laws, or properly to interpret or to enforce existing laws in cases in which their enforcement is necessary for the effective protection of rights of aliens recognized by international law. In particular, aliens are entitled to expect that where their interests are concerned there shall be no relaxation in the application of the law even if the parties directly affected are subjects of the state within whose territory the boycott is conducted and even if the aliens affected by the boycott are injured only indirectly.

---

[1] The Lytton Commission and its experts were, it seems, inclined to accept a wider measure of responsibility in this matter. See Study No. 8 (quoted above), pp. 229, 230. On the responsibility of Soviet Russia for the activities of the Third International, see Lauterpacht in *Grotius Society Publications*, Vol. XIII (1928), pp. 160 *et seq.*; Verdross in *Zeitschrift für öffentliches Recht*, Vol. IX (1930), pp. 577–82; Mannzen, *Sowjetunion und Völkerrecht* (1932), pp. 42–56.

In the first instance there is a duty of repression, of the state's own accord and without waiting for a private complaint, of such acts of interference with personal freedom or property rights as constitute a breach of the criminal law of the country. Such duty includes the enactment of criminal laws sufficient to meet the obligation and a reasonable interpretation of the existing law. Thus a state must be expected to possess adequate penal provision against unauthorized taking away of property of others. But, to quote a recent instance, according to the Chinese Criminal Code seizure of property is not regarded as robbery liable to punishment if the act is not done with the intention of bringing profit to the person responsible for the seizure or to third persons. Such acts escape punishment unless the seizure is accompanied by violence against the person (Article 318 of the Penal Code). This, at least, was the way in which Chinese courts interpreted the existing law. In a case which came before the Shanghai District Court in November 1931, they further mitigated the rigour of the Penal Code by deciding that "leniency should be granted to the defendants because they committed a crime due to the over-expression of patriotism".[1] But a state cannot be held responsible if in some cases criminal prosecution is at the instance of the injured person and if such prosecution never takes place because for the person affected to institute proceedings is to expose himself to a public discussion of acts undertaken in disregard of a strong national sentiment.

In the second instance, apart from the criminal law, there is a duty of impartial enforcement of the private law of torts and generally of the relevant private law. This duty is obvious and without qualifications so far as the aliens are the direct object of the illegal act. But does it apply in relations *inter se* between the subjects of the state? The Chinese assessor before the Lytton Commission vigorously maintained that the answer to this question must be in the negative. He said:

" . . . A foreign nation is not authorized to raise a question of internal law. In fact we find ourselves confronted with acts denounced as unlawful but committed by Chinese nationals in prejudice to other Chinese nationals. Their suppression is a matter for the Chinese authorities and it seems to us that nobody has the right of calling into account the manner in which the Chinese penal law is applied in matters where both offenders and sufferers belong to our own nationality. No state has the right of intervention in the administration of exclusively domestic affairs of another state. This is what the principle of mutual respect for each other's sovereignty and independence means."[1]

---

[1] *In re Ko Yun-ting and Others*, printed as an Appendix to the *Memorandum on the Boycott* submitted to the Lytton Commission of Inquiry, p. 33.

The Lytton Commission was not, it seems, prepared to accept this view. The Japanese complaint, it said, was not that Chinese subjects committed with impunity illegal acts against other Chinese, but that no action was taken to repress violations of the law injurious to Japanese subjects. It is submitted that this is the only correct view. It is a well-recognized rule of municipal law of most countries that in cases of conspiracy and intimidation in which illegal action is taken to the detriment of a third party, that third party is entitled to a legal remedy.

In most countries the law provides some measure of protection, in the domain of the law of torts, against such acts of boycott as are achieved by illegal or immoral means. In English law many an act of boycott will constitute a wrong actionable at the instance of the party against whom the boycott is directed.[2] Intimidation through physical violence or any other illegal act is actionable regardless of whether or not conspiracy exists; and intimidation by way of conspiracy is actionable if effected without lawful justification and with an intention to injure. The conception of what is lawful justification, i.e. what is a just and lawful defence of one's own rights and interests, is an elastic one and leaves sufficient scope for the consideration of the special conditions under which the boycott takes place.[3] But its elasticity is modified by the principle that in any case the use of unlawful means, such as violence or the threat of violence or fraud, constitutes a good cause of action. German law reaches the same result in a different way. German courts have interpreted Articles 823 and 826 of the Civil Code to the effect that a boycott is actionable when the proclamation of it contravenes the criminal law, i.e. when it involves libels or threats, or when it is immoral having regard either to the means used or the purpose aimed at. The means are immoral when, for example, the recital of the facts in the proclamation of the boycott is incomplete or incorrect. The purpose of the boycott is immoral when it aims at or results in ruining the opponent, or when the object pursued is so small as to be out of proportion to the magnitude of the injury inflicted upon the boycotted party.[1] The position in France is, on the whole, similar.[2]

---

[1] *Memorandum on the Boycott*, p. 21.

[2] *Sorrell* v. *Smith*, [1925] A.C. 700, contains a sufficiently clear exposition of the existing law in the matter. It does not attempt to reconcile the inconsistencies between the previous leading cases such as *Allen* v. *Flood*, [1898] A.C. 1; *Mogul Steamship Co.* v. *McGregor Gow*, [1892] A.C. 25; *Quinn* v. *Leatham*, [1901] A.C. 495. And see the recent decision of the High Court of Australia in *McKernan* v. *Fraser and Another*, 46 *C.L.R.* 343. See also conflicting decisions, in the matter of so-called "stop-lists", of the Court of Criminal Appeal in *R.* v. *Denyer*, [1926] 2 K.B. 258, and of the Court of Appeal in *Hardie & Lane, Ltd.* v. *Chilton* [1928] 1 K.B. 663.

[3] See below, p. 138.

The protection, in the domain of the law of torts, which the municipal law of many countries affords against certain manifestations of boycott, is available to the nationals both of the boycotting and the boycotted state. It is available to the latter if they are individually injured as the result of such acts of boycott as are actionable. If, for instance, in Great Britain, in the course of a boycott against a foreign state, unlawful means are used to induce a British firm to abstain from business with a national of that foreign state, the alien in question would be in a position to bring a successful action against the persons responsible. The same remedy would be available to a British firm dealing with a firm of a boycotted country, if that British firm had suffered because persons had been induced by illegal means not to transact business with it. But this remedy is on the whole of limited scope. If the boycott is the result of an intense national movement, it is probable that persons charged with flouting the national sentiment may deem it wiser not to pursue their grievance before a court of law. Individual foreign traders may indeed be in a position to appeal to courts in such cases, but as a rule private persons or individual firms will not be able to point to a concrete loss directly attributable to the boycott. The loss will be suffered by the foreign traders as a whole.[3] Also it will be noted that—to limit the inquiry to English law, which is not backward in defending individual rights menaced by a boycott—apart from the question of conspiracy only such acts of boycott are illegal as are performed by unlawful means. As to boycott by means of conspiracy—and that is, of course, the normal type of boycott—when the means used are lawful much will depend on whether there will be found to be lawful justification for the intentional causing of injury to others. The conception of lawful justification is, as pointed out before, an elastic one. It is possible that in time of national resentment courts may, without disregarding the law, be inclined to see a lawful justification for acts of boycott done in defence of what the defendant deemed to be a collective national interest not of a commercial character, provided always that patriotic action does not assume the form of illegal coercion or intimidation punishable by criminal law.

---

[1] See the decision of the *Oberlandesgericht* (Upper District Court) in Karlsruhe of December 9, 1926 (*Juristische Wochenschrift*, 1927, p. 2382); of the *Reichsarbeitsgericht* (Federal Labour Court) of December 23, 1927, concerning the legality of a lock-out; *International Survey of Legal Decisions on Labour Law*, 1928, p. 177.

[2] See, for instance, the case of *Brune, Brussac and Others*, decided by the Bordeaux Court of Appeal on February 24, 1929 (*Semaine Juridique*, 1929, p. 856), in which the Court adopted a more severe view than that adopted in *Allen* v. *Flood*. And see the cases reported in the *International Survey of Legal Decisions on Labour Law*, 1929, pp. 42–5, and 1930, pp. 59–61, 102–5, 109.

[3] *Quaere*, could any of these bring a so-called representative action? See Order 16, Rule 9, of the Orders of the Supreme Court: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

It will thus be seen that the protection afforded by municipal law against acts of boycott is of a limited scope. So long as the means used are not otherwise unlawful, it would be possible for a boycott of foreign goods to be conducted without contravening the law of the land. Against the toleration of such a boycott the foreign state is not entitled to protest. The situation is different when means are applied which are otherwise punishable by criminal law. The non-enforcement of the criminal law—even if the parties directly concerned are nationals—is in such cases nothing short of denial of the right of protection of the property of foreign subjects, and there ought to be little doubt that it involves the international responsibility of the state. However, effective boycotts may be possible without violations of the criminal law of the country and, generally, without committing acts which are contrary to the law. If the popular sentiment is genuine and widespread and if the national grievance is obvious and overwhelming, the object of the boycott can be achieved by refusal of commercial intercourse on the part of each member of the community without there being any necessity for coercion and intimidation ordinarily punishable by criminal law.

IV

It has been submitted at the beginning of this article that the international responsibility of the state is not involved if the boycott of the goods of a foreign country is pursued by the population by legal methods. There are acts of private individuals against a foreign state which a government must not tolerate. It must not, for instance, tolerate the preparation of a hostile expedition against a foreign state or, when neutral, direct military aid to the units of the fleet of a belligerent. The boycott of foreign goods does not belong to this category. There appears to be no good reason for a change in the existing law by way of imposing upon states the duty to suppress boycotts of this nature. No international agreement can effectively compel the population of a country to buy goods from a foreign state whose policy has become the object of deep resentment and indignation. An international agreement might prescribe the duty to prohibit an *organized* boycott or public propaganda to this end by printed or spoken word. Such an agreement would compel a state to suppress individual freedom in a manner which many states would find distasteful to their traditions and political institutions.

Neither is there a good reason for a summary condemnation of boycotts peacefully conducted by the population of a state on the ground that such boycotts are contrary to the idea of pacific settlement of international disputes. The view that a boycott is an act of economic force identical or comparable with military force in the shape of war is based on a mere manner of speech. Undoubtedly an economic boycott is an instrument of struggle. But it is a peaceful contest as compared with the physical violence of international or civil war. To apply to it the term "war" by juxtaposition with international war in its technical meaning is as misleading as to apply that term to industrial disputes within the state in the form of a strike or lock-out. A strike or lock-out is normally a lawful exercise of a person's right not to enter into a contract. Such withdrawal of work or employment may take place in the course of what is at times called industrial warfare. But industrial warfare is normally a pacific form of contest conducted within the orbit of the law. Equally in regard to economic boycott in the international sphere, we must not be misled by a juxtaposition and implicit equal condemnation of economic and military force. In a world in which physical violence through wars proper has not become a matter of the past, there is an obvious element of exaggeration in the attempts to treat a peaceful form of struggle or resistance as war. Peace, in the sense of the absence of any form of competition, friction, or struggle, is a superficial idea—both within the state and outside it. International peace does not mean absence of international friction, or rivalries, or conflicting ambitions for the realization of men's will to power. It means that competition and conflicts of interests must find a solution by means other than war in its technical legal meaning. International peace does not mean that states will not behave in their mutual relations in a foolish, unfair, or immoral manner, or that such conduct will not be visited by retaliation of a similar nature. In a community from which war in its technical sense has been eliminated and which has not reached the stage of moral perfection, pacific means of pressure are unavoidable. To prohibit them would mean to court the more radical remedy of war. Finally, in a world in which the powerful states are still in a position to impose their will upon weaker members of the international community, a boycott may frequently be the only means of national defence of any degree of effectiveness. It may frequently be the only means of protest and retaliation against a state which finds in its military strength the source of its alleged rights and refuses to the other the benefit of judicial settlement. Certainly, the stronger state may be powerful enough to insist on and obtain the suppression of the retaliatory measure of boycott, but such action will constitute an addition to the original wrong, and not the removal of an action condemned by international law. It follows that, even if it were possible to impose upon states the duty to suppress peaceful boycott of foreign goods, such an innovation, even if feasible, would be open to objection on general grounds. This is not a case in which the separation of the duties of the state from those of the individuals composing it is necessarily productive of injustice.

NOTES

THE REVISION OF THE HAGUE CONVENTION (NO. X OF 1907) FOR THE ADAPTATION OF THE PRINCIPLES OF THE GENEVA CONVENTION TO NAVAL WARFARE

THERE was signed at Geneva on July 27, 1929, by the representatives of forty-seven states and Dominions a Convention for the amelioration of the condition of the wounded and sick in armies in the field.[1] It came into force on June 19, 1931, and was ratified by Great Britain and all the Dominions, except Canada and the Irish Free State, on June 23, 1931. This Convention is a revision, in the light of the experience of the World War, of the Geneva Convention of 1906, which was a revision of that of 1864. Both of these Conventions only applied to land warfare, the application of their principles to naval warfare was much later. The attempt made in 1868 to apply them to hospital ships was unsuccessful, as the Convention of that year was never ratified. However, its articles relating to naval warfare formed the basis of the Hague Convention of 1899 on this subject. In consequence of the revision of the Convention of 1864 in 1906, the Second Hague Peace Conference undertook a revision of that of 1899, as various changes were made in 1906, and in order to clear up certain difficulties which had arisen in practice.[2] Great Britain has not ratified the Tenth Hague Convention, 1907, but during the course of the World War the questions which arose did not turn on its contents as the former Convention was held to be in force, and its fundamental principles, as expressed in the first four articles of both Conventions which relate to the different classes of hospital ships and their duties, are similar.

A revision of the Geneva Convention of 1906 having been made, it would be of advantage to consider the amendments in relation to naval warfare and also to clear up certain difficulties relating to the application of the Hague Conventions which appeared during the World War.

(i) One of the questions which calls for consideration relates to the persons who and things which may be carried on a hospital ship. Throughout the Conventions, hospital ships are referred to as those constructed or adapted specially and solely with the view of aiding the wounded, sick, and shipwrecked (*blessés, malades, et naufragés*), and the protection afforded by the Conventions is to the religious, medical, and hospital staff of any captured ship who are to be inviolable (Tenth Hague Convention, Art. 10), and sailors and soldiers and other persons officially attached to fleets or armies who are taken on board when sick or wounded, who are to be respected and cared for by the captors (Art. 11). Notwithstanding these provisions, the question has been raised whether the Convention applies to the sick and wounded belonging to the land forces who have become casualties on land, to persons belonging to the medical service of the land forces and their reliefs or the reliefs of the hospital ships but not belonging to the staff of a given hospital ship. Moreover, the right of a hospital ship to carry medical supplies and drugs for use of other hospital ships or of the land forces has been questioned.

The report of the Committee of the Hague Conference of 1899 discloses the fact that some of the members of the Sub-Committee desired to have a more complete enumeration of the persons who may be carried on hospital ships than the draft proposed. The report says:

---

[1] *Parl. Paper*, Misc. No. 5 (1931); *Rev. Gén. de Droit International Public*, 1930, p. 521.

[2] See my *Hague Peace Conferences*, pp. 15, 358.

> "In the provisions which the Committee submits to the Conference they speak of 'wounded, sick, and shipwrecked', not of the 'victims of naval war'. This latter expression, true in the majority of cases, will not always be so, and must for this reason be avoided. The rules apply at the moment when there are wounded and sick on board the vessels at sea without there being any need to ascertain whether it was at sea or on land that the wound was caused and the sickness contracted. Consequently, if a ship is devoted (*affecté*) to the transport by sea of wounded or sick of the land army, the ship, the wounded and the sick would be governed by the provisions of our draft. Conversely, it is evident that if wounded or sick sailors are landed and placed in an ambulance or in a hospital ship, the Geneva Convention will apply fully so far as they are concerned."

For these reasons, the Committee thought it unnecessary to insert any special provision on the subject. As regards the carriage of medical supplies and appliances, the hospital ships are provided *en vue de porter secours aux blessés, malades, et naufragés*, and the whole spirit as well as the words of the articles point to the legitimating of the giving of assistance to sick and wounded by bringing the necessary material and personnel to the place where they may be needed, as well as to rendering medical aid on board the hospital ship herself. In my opinion the terms of the Tenth Hague Convention were intended to cover the cases indicated, but as there have been doubts expressed, both by the Sub-Committee at The Hague and during the late War, it is advisable that the wording of the Convention should be made so plain that such doubts can no longer exist. The report of the Committee in 1899 appeared to consider that its terms were so unambiguous as to render any further explanation unnecessary, and that appears to have been accepted in 1907, but in such matters it is safer, in the light of practical experience, to be guided by the principle of inserting words *ex abundanti cautela*.

(ii) Besides the persons above mentioned, two other classes may be referred to, and it would be well that a clear rule should be made regarding them, namely (*a*) shipwrecked persons not belonging to the armed forces who may be rescued by a hospital ship, such as the sailors and passengers on a merchant vessel, whether belonging to a belligerent or to a neutral, and (*b*) persons removed from an enemy merchant ship before she is destroyed by the captor.

In the former case, where these persons are the victims of storm or collision, i.e. of some act unconnected with the war, they do not appear to come strictly within the terms of the Convention, but as their rescue and carriage is a work of common humanity, it should not be considered a violation of the Convention. In any revision this point should be dealt with.

As regards the second class, I shall not deal with it in detail. I have already expressed the view that such services as taking on board uninjured passengers and crews from enemy merchant vessels captured and destroyed by a warship do not come within the scope of the Convention. To take such persons on board a hospital ship would be, in my opinion, to render valuable assistance of a military nature to the warship which has destroyed the merchant vessel, as providing an easy method of accommodating persons for whom the warship is responsible.[1] It would be well for a clear statement to be made on this subject.

---

[1] *Law Quarterly Review*, xxvi, p. 408.

(iii) The internment in neutral countries of persons rescued at sea was the subject of correspondence between several belligerent and neutral Powers during the last War.[1] The principle on which neutral states appear to have acted was that where shipwrecked and wounded persons were landed from warships, either their own or neutral, or their boats, they were interned, but where they were picked up and landed from neutral merchant ships they were released. The articles on the subject (Art. 10 of the Convention of 1899, and Art. 15 of the Convention of 1907) were excluded by all the Powers from ratification. The report of the Committee in 1907 regarding rescue by neutral merchant vessels appears to have been generally acted upon during the War. The whole of the questions relating to the reception by neutral states of persons rescued at sea, together with that relating to material entering neutral states, may be thought rather to belong to the general principles relating to the rights and duties of neutral states than to the topic under consideration, but it is one on which there are doubts, and practice was not uniform during the late War.

(iv) All the Hague Conventions relating to war contained the "Kriege" or non-participating clause, under which their provisions "do not apply except between Contracting Powers, and only if all the belligerents are parties to the Convention". The consequences of this clause were that, technically, all these Conventions were inoperative during the World War, though as regards the Tenth Hague Convention it was provided that the Convention of 1899 should remain in force between all the Powers which signed it but had not ratified the Convention of 1907 (Tenth Hague Convention, Art. 25), but that Convention was also hampered in its operation by a similar clause (Third Hague Convention, 1899, Art. 11). The difficulties attendant on the Kriege Clause are avoided in the Geneva Convention, 1929, which provides that "a state of war shall give immediate effect to ratifications deposited and accessions notified by the belligerent Powers *before or after* the outbreak of hostilities" (Art. 37). A similar provision should be made in the Convention relating to naval warfare.

In the Final Act of the Geneva Conference of 1929[2] the Conference expressed the *vœu* that the countries participating in the Convention should meet in conference in the near future, to regulate the use of medical aircraft in time of war. It is suggested that an opportunity should then be taken to consider the revision of the Hague Conventions relating to the application of the principles of the Geneva Conventions to naval warfare so that the scope of the operation and the details of the application of the Tenth Hague Convention should be made so clear that divergence of opinion between belligerents may be avoided in the future, should a state of war ever necessitate their application.

A. PEARCE HIGGINS.

THE "COMMITTEE OF EXPERTS ON ARTICLE 408"

As a piece of international machinery for recording and controlling the enforcement of one type of multilateral convention, the "Committee of Experts on Article 408 of the Treaty of Versailles" which was established by the International Labour Organization in 1927 deserves a brief mention.

---

[1] *Parl. Paper*, Misc. No. 4 (1918).

[2] *Ibid.*, Misc. No. 7 (1931), Vœu No. 3.

Article 408 of that Treaty and the corresponding Articles of the other Peace Treaties of 1919 and 1920 run as follows:

> "Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request. The Director shall lay a summary of these reports before the next meeting of the Conference."

In pursuance of this Article the International Labour Organization every year addresses to each of its Members a report form (of which a specimen is appended) to serve as a basis of their reports. When received, the reports (between four and five hundred each year) are submitted to the Committee, who with the aid of the staff of the Office examine them and compare them with the national legislation and administrative regulations which purport to apply them in the countries of the Members who have ratified them. Having completed the examination of the information contained in the reports, which may include copies of judgments rendered in the different countries upon the relevant national legislation and extracts from the reports of the national staffs of factory inspectors, mines inspectors, marine superintendents, &c., the Committee makes its Report, through the Governing Body of the International Labour Organization, to the Annual Conference meeting a month or two later. It is the duty of the Committee to draw attention to any discrepancy between the provisions of each Convention and those of the corresponding national legislation, to make inquiry as to the obstacles in the way of complete conformity, and to employ all its power of persuasion to secure it. The Committee itself has no sanctions. Quite apart from the sanctions referred to in Article 419 of the Treaty of Versailles (and the corresponding Articles of the other Peace Treaties), the real sanction lying behind the work of the Committee is that its Report, which is issued as a public document, affords an expert and objective statement upon the basis of which well-informed criticism can be directed and explanations afforded at the ensuing meeting of the Conference of the Organization. As is well known, the delegates attending that Conference comprise both governmental delegates and vocational delegates representing employers' and workers' organizations respectively, so that the Governments have to be prepared to answer criticism from both sides interested in the application of labour conventions. The experience of the Committee over a period of seven years shows that there has been steady progress in the degree of seriousness with which the Conventions are applied and in the amount of attention which is paid by the different states to the comments of the Committee and their suggestions for securing uniformity of application. It has been found that in the majority of cases where the Committee finds it necessary to draw attention to a discrepancy the Governments make no difficulty about introducing the necessary legislative or administrative changes.

The Committee of Experts on Article 408 consists of ten "experts" appointed by the General Conference. In fact the present "experts" include amongst their number nationals of most of the leading industrial countries, but they are not appointed as governmental delegates or as representing the particular countries whose nationals they happen to be.

It is worth considering whether this piece of machinery might not usefully be imitated in the case of certain other types of multilateral conventions where uniform observance of international obligations is important.

The following is a skeleton of the report form issued on behalf of the Committee:

"I. Please give a list of the legislation and administrative regulations, etc., which apply the provisions of the Convention. Where this has not already been done, please forward copies of the said legislation, etc., to the International Labour Office with this report.

Where the national law is not fully in harmony with the provisions of the Convention, please indicate whether the ratification of the Convention has itself had any actual legal effect, and in particular (*a*) whether, and to what extent, the mere act of ratification is considered as having modified previously existing legislation, and (*b*) by what means observance of the Convention's provisions can be enforced.

"II. Please indicate in detail for the several provisions of each of the following Articles of the Convention the provisions of the above-mentioned legislation and administrative regulations, etc., or other measures, under which each Article is applied. . . .

"III. Article 421 of the Treaty of Versailles and the corresponding Articles of the other Treaties of Peace are as follows:

'(1) The Members engage to apply conventions which they have ratified in accordance with the provisions of this Part of the present Treaty to their colonies, protectorates and possessions which are not fully self-governing:

1. Except where owing to the local conditions the convention is inapplicable or,
2. Subject to such modifications as may be necessary to adapt the convention to local conditions.

'(2) And each of the Members shall notify to the International Labour Office the action taken in respect of each of its colonies, protectorates and possessions which are not fully self-governing.'

In application of the second paragraph of this Article, please indicate, in respect of each of your colonies, protectorates or possessions, the action taken for the application of the Convention.

Please indicate, as far as possible, the nature of the conditions which may have led to the decision not to apply the Convention, or to apply it subject to modifications, as provided for in the first paragraph of the same Article.

Please add, in so far as they have not already been communicated to the International Labour Office, all relevant legislative texts, reports, etc.

"IV. Please state to what authority or authorities the application of the above-mentioned legislation and administrative regulations, etc., is entrusted, and by what methods application is supervised and enforced. In particular please supply information on the organization and working of inspection.

"V. Please state whether decisions have been given by courts of law or other courts regarding the application of the Convention. If so, please supply the text of such decisions.

"VI. Please add a general appreciation of the manner in which the Convention is applied in your country, including, for instance, extracts from inspectors' reports, and, if such statistics are available, information regarding the number of workers covered by the relevant legislation, the number and nature of the contraventions reported, etc."

ARNOLD D. McNAIR.

THE OIL PIPE-LINE AND THE MANDATES

OIL is a viscous fluid, and the terms of its transit from the oil-field to the sea, no less than the terms of its extraction from under the ground, are likely to arouse questions of delicacy. The Permanent Mandates Commission at its meeting in 1931 examined the provisions of the conventions made between the High Commissioners of Palestine and Syria with the Iraq Petroleum Company regulating the transit of the mineral oils of the Company through their territories, and made certain animadversions upon them. Some of the members questioned whether certain clauses of the agreements kept the necessary balance between the advantages granted to the concessionnaires and those which would accrue to the mandated territories. There is nothing, indeed, in the conventions which conflicts with the letter of the Mandates, either for Palestine or Syria, although the special privileges given to the Company with regard to acquisition of land, to railway rates, to facilities for obtaining water, and to exemptions from taxation and customs duties, are abnormally wide. New and difficult questions, however, may arise owing to later developments in connexion with the exploitation of the oil-fields of Iraq. In April 1932 the Iraq Government granted a concession to another oil combine, known as the British Oil Development Company, to exploit all lands north of the 33rd parallel and west of the Tigris. If this new enterprise should wish to bring its oil to Haifa in Palestine or to Tripoli in Syria by a pipe-line, they will have to receive the same privileges and immunities as have been accorded to the Iraq Petroleum Company, since the Mandates both for Palestine and Syria prescribe that there shall be no discrimination against the nationals of any state Member of the League as compared with those of the Mandatory or of any foreign state in matters concerning taxation, commerce, or navigation. Both companies indeed are British, but it would certainly be maintained that discrimination as between two British companies is prohibited. It would be a doubtful boon to the mandated territories if two or more pipe-lines were carried across them, particularly under conditions comprising the peculiar privileges and immunities which have been vouchsafed to the Company first in the field. Yet it would seem that Palestine and Syria will have to submit to the burden if any company which obtains an oil concession in Iraq or in Persia wishes to transport its product to the western sea by its own pipes. It is indeed open to the Iraq Petroleum Company, under the terms of its agreement with the Iraq Government, to transport the oil of other enterprises by its pipe-line; but it is under no obligation to do so, and can therefore make terms which may be regarded as prohibitive.

N. B.

BRITISH COMMONWEALTH OF NATIONS—SETTLEMENT OF DISPUTES

THE unfortunate Anglo-Irish dispute on the subject of the Land Annuities has drawn public attention this year to the very unsatisfactory nature of the results of the last Imperial Conference in the direction of the establishment of some permanent machinery for the settlement of differences between the Members of the British Commonwealth. It is to be hoped that it may be possible in the not too distant future to make some progress towards a sympathetic understanding, and hence to a removal of the difficulties which have hitherto prevented the equipment of the British Commonwealth with legal machinery at least as adequate as that which is at the disposition of international society as a whole.

O.

THE GREENLAND CASE

THE judgment of the Permanent Court of International Justice in this case, which is reported at page 174, was not available in time to permit of detailed discussion in the present issue of the *Year Book*, but it cannot be passed over without at least a few words of appreciation. This is undoubtedly one of the outstanding cases in the history of the Court, both by reason of its subject-matter and of the fact that it is the first occasion on which the Court has given a decision under the Optional Clause. The judgment contains a great deal that is of the greatest interest from the point of view of international law, and is a model of clear and persuasive reasoning—a fact which is the more remarkable in view of the enormous mass of material submitted by the parties. Moreover, it is satisfactory to note that there was less difference of opinion on the Bench than has been customary of late. Although the dispute raised issues as to territorial sovereignty which were of great importance to the parties and aroused very strong feelings in both countries, the Court's decision has been accepted with perfect loyalty by the Government of Norway.

A. P. F.

REPORTS OF THE DECISIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

Students of international law will be grateful to the authorities of the Court for the institution and maintenance of the new system of reports, by which the judgments and advisory opinions given in any one year are treated as a single series (called A/B) and not divided into two separate series, and further are paged consecutively throughout the year, so as to bind conveniently in a single volume, after the fashion of a volume of the reports of a year's work of a national court. The former system, by which the report of each case started a new pagination, was far less convenient. The new system is interesting as an outward and visible sign of the assimilation in practical respects of the advisory procedure to what was expected to be the more ordinary contentious procedure.

A further welcome improvement is the inclusion in the A/B series of a subject-index, which indeed appeared for the first time with the volume for 1931. Such an index is indispensable for the study and the practical utilization of the decisions and opinions. Students will be already aware that Series F of the publications of the Court contains a subject-index covering the decisions and opinions rendered by the Court in its first nineteen sessions. These volumes of Series F are published twice during each period of nine years.

The difficulty of finding appropriate names by which to refer to the cases will be solved by usage rather than by any formal regulation. Where some distinctive object such as the ship *Lotus*, or some particular well-known subject of controversy such as the "Free Zones" is concerned, the question of the name settles itself easily enough, but to describe a case by the names of the countries engaged is often inappropriate: in an application for an advisory opinion there are technically no "parties", and in contentious litigation there are too many cases in which the same parties recur; thus the British system of baptism, "*A.* v. *B.*", is not adequate. And to refer to a case merely by a number is to dissociate all idea of its content from its name: it "will never do" to assimilate the decisions of an international court to the inhabitants of a convict prison.

O.

PERMANENT COURT OF INTERNATIONAL JUSTICE

Notes of the past year's decisions will be found, as usual, in another part of this *Year Book*,[1] but one or two points of special interest to students of international affairs may be mentioned here, if only cursorily and without prejudice to fuller treatment at some future date.

---

[1] See p. 160, *infra*.

In the *Memel* case (Series A/B, No. 49) the complete independence of the permanent members of the Court receives a welcome illustration. This independence is well known to all international lawyers, it is unnecessary to dilate on it. But any hostile critic of the Court, whether a journalist or of some other profession, who is inclined to suggest that the Court is swayed by national considerations, would do well to study the judgment in this case, the names of the countries litigants and of the judges of the majority and minority.

The case is also notable for the very welcome expression by the Court of its disinclination to decide general questions apart from the particular facts of the dispute before it.

In the *East Greenland* case (Series A/B, No. 48) an interlocutory application gave the Court occasion to indicate that its intervention before the hearing of a case is in principle determined by the desirability of preventing any prejudice to the legal rights of a party pending a hearing; the Court is not charged with the duty of preventing breaches of the peace.

Lastly, the dispute between Great Britain and Persia in the matter of the Anglo-Persian Oil Company's concession served to illustrate how fragile a reed the so-called Optional Clause may be, if reliance is sought to be placed on it against a country which has accepted the clause, as have the greater part of the signatories, with considerable reservations. The British Government intimated its intention of referring the dispute to the Hague Court, unless within one week the notice cancelling the Oil Company's concession was withdrawn. The Persian Government had no difficulty in framing a case which brought the matter within the reservations which it had made on acceptance of the Optional Clause. In the result the dispute had to be treated as a matter for the mediation of the Council of the League, and the aid of the Court was not invoked.

O.

CANADIAN CASES

FURTHER light has been thrown on the position of treaties in Canadian municipal law[1] by the first three of the cases cited below. In the *Arrow River* case[2] the Supreme Court of Canada decided that

> "a treaty in itself is not equivalent to an Imperial Act, and without the sanction of Parliament the Crown cannot alter the existing law by entering into a contract with a foreign Power. For a breach of a treaty a nation is responsible only to the other contracting nation and its own sense of right and justice. Where, as here, a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are, under our law, enforceable by the courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject. In the case before us it is not suggested that any legislation, Imperial or Canadian (Dominion), was ever passed implementing or sanctioning the provision of the treaty that the water communications above referred to should be free and open to the subjects of both countries. That provision, therefore, has only the force of a contract between Great Britain and the United States which is ineffectual to impose any limitation upon the legislative power exclusively bestowed by the Imperial

---

[1] See "Treaties in Municipal Law—Canadian authorities", *B.Y.B.*, Vol. XIII, p. 122.

[2] *Re Arrow River and Tributaries Slide and Boom Co. Ltd.*, 1932. 2 D.L.R. 250.

> Parliament upon the Legislature of a Province. In the absence of affirming legislation this provision of the treaty cannot be enforced by any of our courts whose authority is derived from municipal law."

From this it is clear that a Canadian treaty without Dominion legislation to implement it cannot confer rights, or impose obligations, upon Canadian citizens, nor prevent a Province from legislating with regard to the subject-matter of the treaty, provided that the subject-matter is one of the classes of subjects assigned to the Province by the British North America Act.

The Privy Council in the *Radio* case[1] go a step farther than they did in the *Aviation* case,[2] for here they decide that the Canadian Government may be a party to an international convention, and if the Canadian Parliament pass legislation implementing such a convention, even though the convention is not such a treaty as defined in Section 132 of the British North America Act, His Majesty is not a party to the convention, and the subject-matter is one which ordinarily belongs exclusively to the provincial legislative jurisdiction.

The *Alien Property* case[3] is relevant only because two of the judges of the Supreme Court of Canada state that "the treaty (of Versailles) it is observed, being a Treaty of Peace, had the effect of law quite independent of legislation". This statement seems both unnecessary and of questionable validity. It would be more satisfactory to require legislation in the case of all treaties if private rights are affected or the existing law altered.

The two cases, *S.S. May* and *S.S. Queen City* v. *The King*,[4] deal with attempts by foreign fishing vessels to justify their entry into Canadian territorial waters (otherwise forbidden) on the grounds of "stress of weather"—a principle of international law recognized by both Canada and the United States, and embodied in Section 183 of the Customs Act of Canada. The Supreme Court of Canada held that "stress of weather" must be such a condition of atmosphere and sea as would produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well-grounded *bona fide* apprehension that if he remains outside territorial waters he will put in jeopardy his vessel and cargo, and there being no such condition, &c., the United States vessels were properly seized.

In the case of *Croft* v. *Dunphy*,[5] Lord Macmillan, in delivering the judgment of the Judicial Committee, raises a nice question as to the validity of Canadian legislation which is contrary to the principles of international law. His Lordship states, in accordance with the authorities, that legislation of the Imperial Parliament is binding upon and must be enforced by English courts even in contravention of generally acknowledged principles of international law. He also concludes that as between the Imperial Parliament and the Dominion Parliament, the latter has power under the British North America Act to legislate, regarding customs, outside ordinary territorial limits. His Lordship does not answer the larger question, but it is submitted that the Dominion Parliament has the power to legislate, in regard to such matters as are allotted to the Dominion by the British North America Act, in contravention of the principles of international law, and that Canadian courts, including the Judicial Committee when hearing Canadian cases, must enforce such legislation.

---

[1] *Re Regulation and Control of Radio Communication*, 1932. 2 D.L.R. 81. [1932] A.C. 304.

[2] *The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54.

[3] *Secretary of State of Canada* v. *Alien Property Custodian for the United States*, 1931. 1 D.L.R. 890.

[4] *S.S. May* v. *The King*, 1931. 3 D.L.R. 15; *S.S. Queen City* v. *The King*, 1931. 3 D.L.R. 147. See too *A.J.I.L.*, Vol. XXVI, p. 374; and W. P. M. Kennedy, *South African Law Times*, Vol. I, p. 134.

[5] *Croft* v. *Dunphy*, 1933. 1 D.L.R. 225. [1933] A.C. 156. See *infra*, p. 155.

TREATIES AND ACTS OF CONGRESS

In *Cook* v. *the United States*, decided in January 1933, the Supreme Court of the United States was called upon to determine the legal relationship between the British-American Liquor Treaty of 1924 and an Act of Congress. The question was raised by the seizure in November 1930 by an American coastguard vessel of a vessel of British registry, said to have been owned by a Nova Scotia corporation, the *Mazel Tov*, carrying an unmanifested cargo of intoxicating liquor, and bound from St. Pierre ostensibly to Nassau. The liquor was evidently intended to be delivered in the United States through the medium of other boats. The vessel had a speed not exceeding 10 miles an hour and was seized at a point 11½ miles from the nearest land of the United States. A provision of the Tariff Act of 1930, which was a re-enactment in identical language of the corresponding provision in the Tariff Act of 1922, authorized the seizure of such vessels within 12 miles of the coast of the United States. The owner of the vessel contended that the provision of the Tariff Act of 1922 had been modified by the treaty of 1924, which substituted in the place of 12 miles, a distance which "can be traversed in one hour by the vessel suspected of endeavouring to commit the offence". Since the speed of the *Mazel Tov* was only 10 miles per hour, its seizure at a point 11½ miles from shore was contrary to the treaty and therefore illegal. The Government of the United States, on its part, denied that the treaty modified the provision of the Tariff Law of 1922 referred to, and contended that if it did have this effect the re-enactment of the provision in 1930 removed the alleged modification, since it is a well-established rule of American jurisprudence that a posterior statute overrides a contrary stipulation in a previously concluded treaty. The Supreme Court, however, rejected the contention of the Government and held that the treaty of 1924 did modify the rule contained in the Act of Congress of 1922 relative to the distance at which seizure could be made and that, moreover, the rule laid down in the treaty was not abrogated by the statute of 1930. As to the latter point, the Supreme Court declared that "a treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed", and it added that there was no evidence that Congress intended in 1930 to modify or abrogate any provision of the treaty of 1924. This reasonable interpretation of the effect of a statute on a prior treaty should commend itself to American constitutional lawyers generally.

JAMES W. GARNER.

EXTRADITION

THE INSULL CASE

The request in October last by the American Government for the extradition by the Government of Greece of Samuel Insull, who had taken asylum in the latter country to avoid trial in Chicago on the charge of embezzlement and larceny alleged to have been committed in that city, raised several interesting questions of treaty law and interpretation. At the time of the demand for Insull's extradition the newly concluded treaty of extradition between the two countries had been ratified by the United States and appears to have been ratified by Greece and published in the official journal of that country, although the ratifications had not been exchanged in accordance with the terms of the treaty. The Greek Government, apparently not regarding the treaty as definitely binding upon it, declined at first to comply with the American request for Insull's extradition. The doctrine, the jurisprudence, and the practice have generally been in accordance with this view, it being considered that when a treaty expressly provides for its own ratification and for the exchange or deposit of the instruments of ratification, it does not become binding on the parties until this act has been performed, and if the period within which the exchange or deposit must take place is prescribed by the treaty, it must be done within that period in order to establish the binding force of the treaty.

Subsequently (November 2, 1932) the ratifications of the treaty were duly exchanged, and the American Government thereupon renewed its demand for Insull's extradition. Insull, having entered Greece prior to the date of exchange of ratifications, which was the date when the treaty became definitively binding, resisted extradition on the ground that his surrender would involve attributing a retroactive force to the treaty. Insull's counsel also argued that the acts with which he was charged had been committed prior to the date upon which the treaty came into force and that consequently he could not be extradited for them even if the charges were true.

The matter having been brought before the Greek Court of Appeals, that tribunal held on November 5 that since the treaty did not expressly except fugitives charged with offences committed prior to the date of its coming into force, the principle of non-retroactivity could not be invoked by the accused as a bar to his extradition. This decision was in the main in accord with the jurisprudence and practice. See the opinion cited by Moore in his work on Extradition, Vol. I, p. 99, and in his *Digest*, Vol. V, p. 248. The request for Insull's extradition was, however, later refused by the Government of Greece, on the ground that the evidence submitted in support of it failed to establish that the acts charged, namely embezzlement and larceny, were in fact such.

RIGHT OF A STATE TO REQUIRE RETURN OF CITIZEN FROM ABROAD TO GIVE TESTIMONY IN THE COURTS

In the case of *Blackmer* v. *United States* (284 U.S. 421 (1932)) the Supreme Court of the United States affirmed the right of the American Government to require a citizen living abroad to return to the United States and appear as a witness at a criminal trial, and to punish him for failure to do so. Blackmer, at the time living in France, had been adjudged guilty of contempt of the Supreme Court of the District of Columbia for failure to respond to a *subpoena* served on him in Paris, for which he had been heavily fined and his property seized for the payment of the fine. Upon appeal to the Supreme Court of the United States, that tribunal affirmed the order of the lower court. The Supreme Court laid it down that a citizen of the United States while living abroad remains bound by its laws and may be punished for disobeying them. There is no rule of international law, said the Court, which stands in the way of the exercise of such authority by the

United States. It possesses an inherent sovereign power to require the return to his own country of a citizen residing abroad whenever the public interest requires it, and to punish him for failure to respond. It is beyond controversy that one of the duties which a citizen owes his country is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned. As to the right of the United States to serve through the medium of its consul a *subpoena* on an American citizen in a foreign country, that, said the Court, was a question solely between the Government of the United States and the citizen, and its exercise constitutes no invasion of the right of the foreign state in which the *subpoena* is served. Nor is it necessary that the treaty which deals with the privileges of consuls specifically authorize the service of *subpoenas* on foreigners. "The intercourse of friendly nations, permitting travel and residence of the citizens of each country in the territory of the other, presupposes and facilitates communications between the government of the one and its citizens residing in the territory of the other."

JAMES W. GARNER.

ADMIRALTY COURT

POWER TO DECLINE JURISDICTION

IN *Canada Malting Co. Ltd.* v. *Patterson Steamships Ltd.* the Supreme Court of the United States, in a decision rendered on April 11, 1932 (285 U.S. 413), affirmed the right of the Admiralty Courts to refuse to take jurisdiction of suits between foreigners in cases of collision occurring within the territorial waters of the United States. In this case two ships of Canadian registry and ownership, each carrying cargo from one Canadian port to another, collided on Lake Superior while unintentionally on the American side of the international boundary line, and as a result one of the ships was sunk. While suit was pending in a Canadian Court of Admiralty to determine the fact of liability for the sinking of the ship, libels *in personam* against the owner of one of them were filed by the cargo owners in a federal district court of the United States. All the parties were citizens of Canada, as were also the officers and crew. It was alleged that the motive of the cargo owners in bringing the suit in a court of the United States was to take advantage of the opportunity which the law of the United States offered for the recovery of full damages from the non-carrying vessel, whereas under Canadian law the liability would be divided equally between the two vessels if both were at fault.

For the petitioners it was argued that, since the collision occurred in the waters of the United States, the jurisdiction of the American Admiralty Courts was mandatory and could not be declined even though the parties were citizens of foreign countries. In support of this view the libellants cited the statement in the *Belgenland* (114 U.S. 365) that "the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong". Mr. Justice Brandeis, speaking for the Court in the present case, expressed the opinion that the suggestion drawn from the case of the *Belgenland*, that the discretion of the Admiralty Courts to refuse to take jurisdiction existed only in cases occurring beyond the territorial jurisdiction of the country to which the courts belong, was unsupported by either previous or later decisions of the Supreme Court, nor was it justified by the language relied upon, when that language was read in its context. He also added that the unqualified discretion of the Admiralty Courts to decline jurisdiction in cases between foreigners appeared to be supported by an unbroken line of decisions in the lower federal courts.

James W. Garner.

THE CONVENTION FOR LIMITING THE MANUFACTURE AND REGULATING THE DISTRIBUTION OF NARCOTIC DRUGS[1]

The international campaign against the menace of the illicit traffic in dangerous drugs has been carried one stage farther by the International Conference for the Limitation of the Manufacture of Narcotic Drugs which met at Geneva under the auspices of the League of Nations from May 27 to July 13, 1931. The Conference was attended by the accredited delegates of fifty-four states, in striking contrast to the meagrely supported Conferences of The Hague in 1912 and of Geneva in 1925.

Probably nothing in the history of social abuses has shocked public opinion more deeply than the revelation that between the years 1925 and 1929 no less than 100 tons of habit-forming drugs passed into the illicit traffic, although the total annual requirements of the world for medical and scientific purposes were estimated at approximately 36 tons.

The necessity for a limitation at least of manufacture, the rejection of which in 1925 had caused China and the United States of America to withdraw from the Conference, was at last recognized in the work of the Conference of 1931, and the Convention of 1931 deals primarily with the special problem of limitation of manufacture, though at many other points it supplements the régime of control established by the preceding Conventions.

Chapter I gives the necessary definitions.

Chapter II creates a system for arriving at an estimate of the total quantity of each drug required for medical and scientific purposes by each of the contracting parties for the following year. Estimates for both contracting and non-contracting parties which fail to furnish their own estimates are made by the Supervisory Body established by the Convention. The estimates are sent in to the Permanent Central Board and examined by the Supervisory Body which may request further information or explanations from any Government, and, with the latter's consent, amend the original estimates. Supplementary estimates may be sent in and are subject to similar examination. These estimates, prepared in accordance with a model prescribed by the Permanent Central Board, together serve to indicate the total world's requirements of drugs for legitimate purposes. The Supervisory Body is provided through the work of a secretariat with the necessary information for use in checking the national estimates.

Chapter III provides for the limitation of manufacture in any country to the total quantities of each of the drugs shown in the estimates for that country. Allowance is made for necessary exports from manufacturing countries. But care is taken to guard against the manufacture of excessive quantities by stipulating that any excess shall be deducted from the amounts to be manufactured during the following year. Imports, less re-exports and amounts of the drugs seized and utilized, are similarly deducted. Excess stocks existing at the time when the Convention comes into force are either to be taken into account in estimating for manufacture or only released by the Government holding them in such a way as may ensure conformity with the Convention.

---

[1] It has not been found possible, for reasons of space, to note all the principal provisions of the Convention. The reader is referred to the text of the Convention itself, *League of Nations Document*, C. 455, M. 193, 1931, XI.

This system of limitation of manufacture to the quantities shown in nationally compiled estimates subjected to the scrutiny of an international organ leaves each consuming country free to choose where and how it will purchase its drugs.

In Chapter IV the export of heroin is prohibited, except to a non-manufacturing country on receipt of a request accompanied by an import certificate from the Government concerned. Certified exports may only be consigned to a Government Department.

Chapter V specifies the different forms of control to be applied to the different groups of drugs.

In Chapter VI the contracting parties agree to maintain a special administration in each country for applying the terms of the Convention and for regulating the trade in drugs. Regular statistical returns are to be made to the Government by each manufacturer. A form of indirect limitation of manufacture is effected by prohibiting manufacturers from normally having quantities of the raw materials greater than the amounts required for manufacture during the ensuing six months.

Chapter VII contains general provisions. Notification with full details by the Government concerned of new factories authorized to manufacture or convert drugs must be given to the Secretary-General. Similarly, notification is required when a previously authorized factory ceases operations. Provision is also made for the communication of national laws and regulations; for the submission of an annual report by each state on the working of the Convention to the Secretary-General; for the interchange of detailed information on each case of illicit traffic, and for the settlement of disputes concerning the interpretation or application of the Convention. A contracting party may declare that he accepts no obligations in respect of his colonial and overseas territories. The Convention comes into force after ratification by twenty-five states, including four of the eight principal manufacturing states. It may only be denounced five years after the date of coming into force. A conference for revision may be summoned with the consent of one-third of the states which at the time are bound by the Convention.

The Final Act of the Conference contains a number of recommendations, amongst which the most important concern (*a*) the drafting of a Model Code by the Advisory Committee on Traffic in Opium and other Dangerous Drugs which would serve as a guide to Governments in the framing of legislative or administrative provisions and give effect to the Convention; (*b*) the establishment of a state monopoly in each country over the trade in and, wherever possible, the manufacture of the drugs covered by the Convention; (*c*) the conclusion of a convention on the lines of the International Convention on Counterfeit Currency, which would make the illicit manufacture and possession of and trade in drugs an international penal offence; (*d*) the possibility of abolishing or radically restricting the use of heroin for medical purposes.

The Convention, which by March 1, 1933, had been signed by thirty-seven states and ratified by ten, is unique both from a legal and an economic point of view, as the first general international agreement which regulates all the phases of production, distribution, and use of an industrial product from the time of the entry into the factory of the raw material for manufacture to its final consumption for medical or scientific purposes or its entry into the illicit traffic. It should be noted, however, that no provisions, other than the indirect limitation represented by restrictions upon the purchases of authorized manufacturers, are made for the limitation of the cultivation of the opium poppy and the coca leaf. Proposals made in the course of the Conference to extend the scope of the negotiations then in progress to the limitation of the production of the raw materials were rejected. Further, the Convention makes no provision for control of the trade in raw materials. Parties to the present Convention, therefore, which have not ratified the Geneva Convention are under no obligation to supervise the trade in opium and coca leaves. This gap would appear to leave an opportunity for leakages into the hands of unauthorized manufacturers. Nevertheless, in devising a system which will only permit drugs to leave the factories in so far as it is legitimate for them to do so, while at the same time permitting every one to buy and sell freely, the Convention may be said to make a notable advance towards the goal of the suppression of drug-addiction.

S. H. Bailey.

THE DOCTRINE OF THE CONTIGUOUS ZONE AND THE DICTA IN CROFT *v.* DUNPHY

In *Croft* v. *Dunphy*, [1933] A.C. 156 the Privy Council had to consider the powers of the Canadian Parliament, prior to the Statute of Westminster, to enact legislation having extraterritorial effect. A vessel, registered in Canada, and belonging to a Canadian resident, had been seized at a distance 11½ miles from the coast in pursuance of authority conferred by a Canadian Customs Act to seize vessels registered in Canada "hovering" within 12 marine miles of the Canadian coast. Their Lordships held that under the British North America Act the Canadian Parliament had full power to enact this provision.

The issue was thus purely one of Canadian Constitutional Law. The provision impugned did not purport to apply to vessels registered outside Canada, for the seizure of which a different limit, namely, 3 miles from the coast, was prescribed. "The sole question", as the judgment expressly states, "is whether the Imperial Parliament, in conferring upon Canada, as it admittedly has done, full power to enact customs legislation, bestowed or withheld the power to enact the provisions now challenged. No question of any infraction of international law arises."

In the course of the hearing the Attorney-General was invited by the Board to intervene, but he stated that having considered the issue raised in the case, he did not deem it his duty to offer any argument. This decision was perhaps unfortunate, for certain remarks in the judgment appear to refer to the doctrine of the alleged "Contiguous Zone" in the international law of territorial waters, which is a matter of general imperial interest upon which the fullest argument was clearly desirable. Their Lordships use the following words: "whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health, and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory."

Removed from their context in the case, where the question, as their Lordships said, was "a domestic one between the Imperial Parliament and the Dominion Parliament", this language might seem to imply that it has long been recognized that legislation of this kind may be enforced as a matter of law against foreign, as well as against national, vessels. This, however, would have been to ignore, without discussion or argument, the well-known controversy which exists on this question; it would also have been to go far beyond the authorities which the judgment itself cites in support of the proposition. Among those authorities are *Le Louis* (1817) 2 Dodson, 210, a case which, as Phillimore long ago pointed out, "will not be found on examination to support the lawfulness of a seizure beyond the marine league, though often cited for this purpose",[1] and where, indeed, Lord Stowell expressly stated that the practice rests on the "common courtesy of nations"; Sir Travers Twiss, who in the passage cited in the judgment describes the jurisdiction as "permissive" and a few sentences before says that "such laws and regulations have no foundation of *strict Right* against other nations";[2] Hall, who says, in a passage just before that quoted in the judgment, that "the powers taken are not put forward as a right; they merely formulate consent. Against a state which resisted their exercise they would not be maintained";[3] and Phillimore, who says that judgments under such legislation "could not have been sustained if the foreign states whose subjects' property had been seized had thought proper to interfere".[4]

The unsettled state of law and practice on this matter was revealed in the preparatory work for the Hague Codification Conference of 1930, where an unsuccessful attempt was made to conclude a convention on the law of territorial waters. A questionnaire was circulated in which the states were asked to answer *inter alia* the following questions:[5]

> III (*c*) Does the state claim to exercise rights outside the territorial waters subject to its sovereignty? If so, what precisely are those rights? On what are they founded? Are they claimed within a belt of fixed width or within an indeterminate area of the waters adjacent to the coast but outside the territorial waters?
>
> (*d*) Does the state admit any claim by any foreign state to exercise such rights outside the territorial waters subject to the sovereignty of the latter state?

The replies differed greatly. Among the principal maritime Powers Great Britain replied that she made no claim to exercise rights over the high seas outside territorial waters, and that claims by foreign states to exercise rights of jurisdiction or control over the waters of the high seas adjacent to the belt of territorial waters of those states had never been admitted and had always been objected to by her; Germany neither claimed nor recognized the rights referred to in the questions, but she was willing to consider a change in the law; France rejected the idea of a breadth of territorial waters uniform for all purposes; the United States claimed to exercise "a certain amount of control over foreign ships four leagues from the coast for fiscal and customs purposes";[6] Japan neither claimed nor recognized the alleged rights; Italy claimed "special rights" within twelve miles.

A number of recent writers have exhaustively examined and re-examined the question, but their conclusions are also divergent. Jessup believes that there is "sufficient evidence of acquiescence in reasonable claims to warrant the assertion that a customary rule of international law has grown up under which such acts may be held legal if they meet the test of reasonableness. The relative vagueness of this norm makes it necessary to state that a nation acts in such cases at its peril".[1] Masterson, who has collected a mass of hitherto unpublished material on the Hovering Acts and particularly on the manner in which they were actually administered, concludes that "in view of the practice of nations in enforcing their revenue laws beyond the zone of territorial waters or sovereignty, a customary rule of the law of nations may be said to exist which permits a state to take jurisdiction, under such laws, over foreign vessels beyond such waters".[2] On the other hand, Baty, who has also made an exhaustive research into the municipal laws which appear to assume jurisdiction beyond the three-mile limit, finds that states "have never in practice successfully asserted against a recalcitrant state a zone exceeding the three-mile limit".[3]

---

[1] *International Law*, 2nd ed., para. 198.

[2] *Law of Nations*, Peace, 2nd ed., p. 310.

[3] *Foreign Powers and Jurisdiction of the British Crown*, para. 108.

[4] *Loc. cit.*, para. 198.

[5] *League of Nations Publications*, C. 74, M. 39, 1929, V. p. 22.

[6] The Supreme Court has, however, recently pointed out that "prior to the Eighteenth Amendment the U.S. had never attempted, in connexion with the enforcement of our customs laws, to board foreign vessels beyond the three-mile limit except where consent was implied from the fact that the vessel, being hailed, answered that she was bound for the U.S., or where a vessel had been discovered violating our laws within the three-mile limit and, while endeavouring to escape, was hotly pursued". (*Cook* v. *U.S.* (case of *Mazel Tov*) S.C. 146.)

This unfortunate uncertainty of the law is no accident. It is due to the complexity of the subject-matter, which in turn is due partly to the differing interests of different states, and partly to the variety of purposes for which the jurisdiction may be desired. Four of these, "police, revenue, public health, and fisheries" were mentioned in the judgment of the Committee, but when the question comes to be settled, either by convention or judicial decision, it does not seem necessary that the same considerations should apply to each of these purposes. At any rate it is submitted that the great authority of the Privy Council cannot, on the strength of the dicta in *Croft* v. *Dunphy*, be hereafter regarded as committed to one particular solution of this difficult and many-sided question.

J. L. BRIERLY.

INSTITUTE OF INTERNATIONAL LAW

THE Institute met in August 1932 at Oslo, under the Presidency of M. Beichmann and the Vice-Presidency of M. Max Huber. Members and Associates were fortunate in the gracious marks of interest shown by Their Majesties the King and Queen of Norway, and in the hospitality of the University of Oslo—in whose buildings the meetings were held—and also of the Municipality.

The items which in a well-filled programme attracted most general interest were perhaps those of the Protection of Nationals Abroad and of the Nationality of Married Women, the former being the subject of a report by Professor Borchard, and the latter of a motion sponsored by Dr. James Brown Scott. The main upshot of the discussions on these topics was to bring out the strong current of feeling in the Institute for the international recognition of the rights of the individual.

Amongst other subjects of debate, mention must be made of the interesting discussion of the limits of "domestic jurisdiction"—a discussion which served perhaps mainly to illuminate the difficulties that beset the attempt at a final formulation of principles. Nor can an English writer pass over without a word of regret the rejection by a narrow majority of a proposal by one of the Commissions to establish the general principle that the capacity of individuals should be regulated by the law of the domicil rather than by the law of nationality.

It is understood that this year (1933) there will be no plenary session of the Institute, the next full meeting being, it is hoped, held in Madrid in 1934. It is hoped in the interval to introduce certain changes in the method of work, and specially to improve the operation of the preparatory commissions.

O.

---

[1] *Law of Territorial Waters and Maritime Jurisdiction*, p. 95.

[2] *Jurisdiction in Marginal Seas*, p. 380.

[3] *American Journal of International Law*, 1928, p. 510.

INTERNATIONAL LAW ASSOCIATION

The Thirty-seventh Conference of this Association was held from August 8 to 13, 1932, at Oxford in the Hall of the Union Society under the presidency of Lord Blanesburgh.

Wadham and Jesus Colleges both offered accommodation, and the co-operation of the University and City authorities was most generous and most valuable.

About 180 members were present: America (U.S.), Belgium, Brazil, Bulgaria, Canada, Czechoslovakia, Denmark, France, Germany, Great Britain, Greece, Hungary, Italy, Malta, the Netherlands, Norway, Poland, Spain, Sweden, and Switzerland were all represented.

The Association at its inaugural meeting was welcomed to Oxford by the authorities both of the University (Dr. J. A. R. Munro, Rector of Lincoln, for the Vice-Chancellor) and of the City (Alderman Bennett, Mayor), reply being made on behalf of the members. The address of the President and a speech by Sir John Simon concluded the inaugural proceedings.

During the Conference thirteen subjects came up for discussion in the form of the customary reports as presented by the appropriate committees.

In so far as the possibilities of a conference allow, several subjects were substantially finished: Draft Convention on the Legal Status of the Property of their respective Nationals in the Contracting States; Jurisdiction and Recognition of Decrees of Divorce and Nullity of Marriage; Rules on the Effect of War on Contracts; Draft Convention on the Sale of Goods; the Effect of War on Private Enemy Property, and lastly, Optional Forms of C.I.F. Contracts; of all these it may well be claimed that they represent work well done, available as the foundation of far-reaching improvements in international law.

An event of the sessions was the intervention of Professor J. L. Brierly in the discussion on Neutrality, supported by Dr. Arnold D. McNair, Mr. F. Llewellyn-Jones, M.P., Dr. W. Barandon and others, which led to the abandonment of this discussion by the Conference on the ground that under the Covenant of the League of Nations, the Briand-Kellogg Pact and other international instruments the old-fashioned Neutrality with its rules is obsolete. It was decided to study the subject as affected by these Conventions. In the result the consideration of Neutrality remains in suspense.

Among the fresh subjects brought before the Conference and not there finished, that of Delay in Litigation offers perhaps the widest scope for investigation. Co-operation in this relation was requested by the Baltic and International Maritime Conference of Copenhagen.

Several other subjects were, after discussion, adjourned for further consideration at the next Conference, which it is expected to hold at Budapest in 1934.

THE GROTIUS SOCIETY

The Seventeenth Annual Meeting of the Society was held on April 12, 1932, in the Hall of Gray's Inn under the presidency of Lord Hanworth, M.R., when His Excellency Jkr. Dr. W. J. M. van Eysinga, a member of the Permanent Court of International Justice, read a paper on "The Netherlands and the Law of Neutrality during the Great War".

The eighteenth volume of the Transactions of the Society contains, in addition to Dr. van Eysinga's paper, papers by Sir Walter J. Napier on "Nationality under the Peace and Minorities Treaties"; by Sir Arnold Wilson, K.C.I.E., on "The Administration of Occupied Territory—a Commentary on the Bellot Rules—illustrated by experience in Mesopotamia"; by F. Llewellyn-Jones, M.P., on "The Revision of Treaties and the Covenant of the League of Nations" (two papers); by Professor E. Stanislaus Rappaport, judge of the Supreme Court of Poland, on "The Problem of Interstate Criminal Law"; by Dr. jur. Ferenc. A. Váli of Budapest on "The Austro-German Customs Régime before the Permanent Court, considered with reference to the proposed federation of Danubian States"; by M. A. Caloyanni, judge *ad hoc* of the Permanent Court, on "The Balkan Union, the Balkan Conferences and the Balkan Pact"; by Sir John Fischer Williams, K.C., on "The New Doctrine of Recognition"; by Lt.-Col. Harold Jacob, G.S.I., on "The Kingdom of the Yemen: its place in the Comity of Nations"; by Dr. Paul de Auer, LL.D. of Budapest, on "The Revision of Treaties"; and by W. J. Heyting on "The Anglo-American Conception of Due Process of Law".

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS

JUDGMENTS AND ADVISORY OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

JUDGMENT DELIVERED JUNE 7, 1932

Case of the Free Zones of Upper Savoy.[1]

THIS was the final judgment in this very important case, previous stages of which are reported in the *Year Book* for 1930 and 1931. By a Special Agreement signed on October 30, 1924, and ratified in 1928, France and Switzerland asked the Court to determine the interpretation of Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes, and to settle all the questions involved by the execution of Article 435, paragraph 2.

Article 435 provides as follows:

> (1) "The High Contracting Parties, while they recognize the guarantees stipulated by the treaties of 1815, and especially of the Act of November 20, 1815, in favour of Switzerland, the said guarantees constituting international obligations for the maintenance of peace, declare nevertheless that the provisions of these treaties, conventions, declarations, and other supplementary acts concerning the neutralized zone of Savoy, as laid down in paragraph 1 of Article 92 of the Final Act of the Congress of Vienna and in paragraph 2 of Article 3 of the Treaty of Paris of November 20, 1815, are no longer consistent with present conditions. For this reason the High Contracting Parties take note of the agreement reached between the French Government and the Swiss Government for the abrogation of the stipulations relating to this zone which are and remain abrogated.
>
> (2) "The High Contracting Parties also agree that the stipulations of the treaties of 1815 and of the other supplementary acts concerning the free zones of Upper Savoy and the Gex District are no longer consistent with present conditions, and that it is for France and Switzerland to come to an agreement together with a view to settling between themselves the status of these territories under such conditions as shall be considered suitable by both countries."

The Annexes to this article contain the text of notes exchanged between the French and Swiss Governments in which the latter acquiesced in its provisions, subject to certain conditions and reservations, including the statement that "the Federal Council would not wish that its acceptance of the above wording (i.e. Article 435, paragraph 2) should lead to the conclusion that it would agree to the suppression of a system (i.e. the régime of the free zones) which has been well tested".

The free zones mentioned in paragraph 2 above are districts in French territory contiguous to the Swiss cantons of Geneva and Valais which, by virtue of treaties negotiated at the close of the Napoleonic wars, were placed outside the French customs line. In other words, the political frontier and the customs frontier did not correspond, but the French customs line was withdrawn a certain distance from the frontier, with the result that persons and goods were enabled to pass across the Franco-Swiss frontier to and from the intervening districts without being subjected to French customs examination or duties. No countervailing obligation was imposed upon Switzerland, which remained free to impose what duties it chose at the political frontier, but in fact when the free zones system was instituted Swiss tariffs were very low. In 1849 an exclusively Federal Customs system was established under which the rates of duty were increased and commercial agreements were made between France and Switzerland for reciprocal privileges, which remained in force from 1851 to 1918, when they were denounced by the French Government. Negotiations then took place with a view to substituting for the free zones régime one more consistent with modern ideas, and these negotiations were still proceeding when the French Government proposed to take advantage of the Versailles Conference to insert in the Treaty a provision dealing with the subject, the main object in view being to obtain from the Powers which were parties to the international instruments under which the free zones were originally created a declaration of disinterest in any new arrangement arrived at between France and Switzerland. Switzerland, which was not a party to the Treaty of Versailles, consented to the insertion in the Treaty of Article 435 subject to the conditions and reservations referred to above and annexed to the article.

---

[1] Series A/B, No. 46. The Court's publications can be obtained from the English agents: Allen & Unwin, Ltd., 40 Museum Street, London, W.C. 1.

Negotiations then took place between the two Governments for the establishment of a new régime, and a convention was signed in 1921 which provided for the abolition of the free zones with compensation. The parliaments of both countries approved this convention, but a demand was made in Switzerland for a plebiscite in accordance with the Constitution, and, the vote being adverse, the Federal Government was unable to ratify.

In 1923 France passed and applied a law providing for the establishment of the customs line at the political frontier, thereby abolishing the free zones, and ultimately the dispute between the parties was submitted to the Court by the Special Agreement already mentioned.

The first question to be decided under that document (Article 1, para. 1) was as follows:

> "Whether, as between France and Switzerland, Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes, has abrogated or is intended to lead to the abrogation of the provisions of the Protocol of the Conference of Paris of November 3rd, 1815, of the Treaty of Paris of November 20th, 1815, of the Treaty of Turin of March 16th, 1816, and of the Manifesto of the Sardinian Court of Accounts of September 9th, 1829, regarding the customs and economic régime of the free zones of Upper Savoy and the Pays de Gex, having regard to all facts anterior to the Treaty of Versailles, such as the establishment of the Federal Customs in 1849, which are considered relevant by the Court."

The parties did not agree as to the exact meaning of this question. The French Government contended that it involved two propositions between which the Court must choose; i.e. either the Treaty of Versailles had abrogated, or it intended to lead to the abrogation of, the free zones. The Swiss Government, on the other hand, maintained that the Court could reply to both propositions in the negative. Both parties agreed that the phrase "is intended to lead to the abrogation" contemplated abrogation as a *necessary* result of the Franco-Swiss agreement envisaged in Article 435 (2) of the Treaty.

The judgment of the Court observes that it is common ground that the real divergence between France and Switzerland in this case turned on the question whether the free zones could be abolished without the consent of Switzerland. If the French interpretation of the first question in the Special Agreement was accepted it would be equivalent to deciding the merits in advance against Switzerland. It is unreasonable to suppose that at the moment when the dispute was about to be submitted to a judicial organ Switzerland abandoned the legal position she had constantly maintained in regard to the vital point in controversy. It is true that every Special Agreement, like every clause conferring jurisdiction upon the Court, must be interpreted strictly, but that rule cannot be applied in such a way as to give the Special Agreement, under the guise of strict interpretation, a construction which in itself prejudges the answer to the question in dispute.

The Court then turns to the first proposition:—As between France and Switzerland, has Article 435 (2) with its Annexes abrogated the provisions concerning the free zones?—and as a matter of construction holds that the answer is No.

With regard to the second point, viz. whether Article 435 (2) with its Annexes is intended necessarily to lead to abrogation, this could only be so (*a*) if by acquiescing in Article 435, subject to the reservations set out in the Annex, Switzerland had bound herself to enter into negotiations for an agreement involving the abrogation of the free zones' régime, or (*b*) if Switzerland's consent to abrogation was not necessary because she had no actual right to the free zones. As to (*a*), the judgment observes that Article 435 (2) is not a mandate involving an obligation for France and Switzerland to abrogate provisions no longer consistent with present conditions, but an authorization, resulting from the disinterested attitude assumed by the Powers which had signed the old treaties, entitling France and Switzerland to abrogate, if they agreed to do so. But even if the text could be interpreted as a mandate, the Swiss reservations would make it impossible to hold that Switzerland accepted it. As to (*b*), the general remark is made that the very terms of Article 435 (2) presuppose the existence of a right on the part of Switzerland derived from the old stipulations. It is hard to understand why the Powers which signed the Versailles Treaty, if they considered that Switzerland's consent was not necessary, did not declare the free zones abrogated on their own authority. The Court proceeds to examine the instruments under which the free zones were created and points out that in each case where Switzerland was not a party to the actual treaty setting up a particular zone she acquired contractual rights by some collateral instrument. This made it unnecessary to decide the legal nature of stipulations in favour of a third party, but certain observations on this subject call for notice. The judgment states that although it cannot be lightly presumed that stipulations favourable to a third state have been adopted with the object of creating an actual right in its favour, there is nothing to prevent the will of sovereign states from having this object and effect. The question is one to be decided in each particular case: it must be ascertained whether the states which have stipulated in favour of a third state meant to create for that state an actual right which the latter has accepted as such. The conclusion upon point (*b*) is that the free zones cannot be suppressed without Switzerland's consent.

Article 2, paragraph 1, of the Special Agreement provided that failing agreement between the parties settling the new régime within a specified time

> "the Court shall, by means of a single judgment rendered in accordance with Article 58 of the Court's Statute, pronounce its decision in regard to the question formulated in Article 1 and settle for a period to be fixed by it and having regard to present conditions, all the questions involved by the execution of paragraph 2 of Article 435 of the Treaty of Versailles".

As regards this task, the Court was confronted by a fundamental difference in the standpoints of the parties. According to the French Government, the Court was required to effect, on behalf and instead of France and Switzerland, the settlement contemplated by Article 435, paragraph 2, of the Treaty of Versailles. The Court, according to this view, would have the same powers and the same freedom of judgment and decision as France and Switzerland themselves had in negotiating the agreement contemplated by this provision of the Treaty. Just as France and Switzerland themselves would not have been fettered in this respect by the conclusions of the Court's deliberation upon the question formulated in Article 1 of the Special Agreement, so the Court would not be bound by those conclusions. The Court, on the contrary, would have to establish the régime which appeared to it to be most expedient having regard to present conditions, and it would be free, according to its view of the conditions, either to abolish the zones or to maintain them.

The Swiss Government, on the other hand, contended that the Court must, "by a single judgment", first of all decide the question enunciated in Article 1 of the Special Agreement touching the interpretation of Article 435, paragraph 2, with its Annexes, and then settle all the questions involved by the execution of that paragraph; Switzerland therefore considered that the Court had not merely to make this settlement on grounds of expediency, but that the settlement to be established must be founded on respect for Switzerland's rights as recognized by the Court in its answer to the question enunciated in Article 1 of the Special Agreement.

On this issue the judgment observes that in fact it is hardly conceivable that a single judgment should contain in the first place the interpretation of Article 435, paragraph 2, of the Treaty of Versailles with its Annexes, and then go on to lay down in connexion with the settlement of the questions involved or the execution of the same article, provisions which disregarded or conflicted with the interpretation given by the Court. The French argument could not be upheld. While it was certain that the parties, being free to dispose of their rights, might have embodied, in the negotiations contemplated in the Special Agreement, or in any future agreement, any provisions they might desire, and, accordingly, even abolish the free zones or settle matters lying outside the framework of the régime with which Article 2 of the Special Agreement deals, it in no way follows that the Court enjoys the same freedom. Such freedom, being contrary to the proper function of the Court, could, in any case, only be enjoyed by it if such freedom resulted from a clear and explicit provision, which is not to be found in the Special Agreement. The Court therefore held that it was bound to deal with the questions involved in the execution of paragraph 2 of Article 435 of the Treaty of Versailles upon the footing that it must recognize and give effect to the rights which Switzerland derived from the treaties of 1815 and the other supplementary acts relating to the free zones.

In this connexion the French Government relied upon a contention that the change of circumstances since 1815 had been so great as to justify the Court in holding that the old treaties had lapsed. This argument was held by the Court to fail on the facts, and the judgment, therefore, expressly refrains from expressing any view upon the vexed question of the *clausula rebus sic stantibus*.

Paragraph 2 of Article 2 of the Special Agreement provides that, if the judgment of the Court contemplated the import of goods free or at reduced rates through the Swiss or French customs barrier, the regulation of such importation should only be made with the consent of both parties. By this provision the two parties subordinated to their joint concurrence a part of the Court's judgment, and the Court maintained the opinion expressed in the Order of December 6, 1930,[1] that such a condition could not be reconciled with the provisions of the Court's Statute which make the judgment binding and final. It would be incompatible with the Court's position as a court of justice to give a judgment which would be dependent for its validity on the subsequent approval of the parties. But even apart from this objection the Court would have hesitated to undertake a task involving, not matters of law, but the interplay of economic interests. Such questions are outside the sphere in which a court of justice, concerned with the application of rules of law, can help in the solution of disputes between states.

The judgment points out that the power of the Court to fulfil the task entrusted to it under Article 2, paragraph 1, of the Special Agreement was limited by the necessity not only to respect Switzerland's right to the zones, but also to respect the sovereignty of France over the zones, which sovereignty is complete in so far as it has not been limited by the old treaties. It is accordingly on this basis that the decision on this part of the case proceeds.

In the result judgment was given as follows:

"In regard to the question formulated in Article 1, paragraph 1, of the Special Agreement:

"That, as between France and Switzerland, Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes, neither has abrogated nor is intended to lead to the abrogation of the provisions of the Protocol of the Conference of Paris of November 3rd, 1815, of the Treaty of Paris of November 20th, 1815, of the Treaty of Turin of March 16th, 1816, or of the Manifesto of the Sardinian Court of Accounts of September 9th, 1829, regarding the customs and economic régime of the free zones of Upper Savoy and the Pays de Gex.

"In regard to the question referred to in Article 2, paragraph 1, of the Special Agreement:

"That the French Government must withdraw its customs line in accordance with the provisions of the said treaties and instruments; and that this régime must continue in force so long as it has not been modified by agreement between the parties;

"That the withdrawal of the customs line does not affect the right of the French Government to collect at the political frontier fiscal duties not possessing the character of customs duties;

"That, as the free zones are maintained, some provision for the importation of goods free of duty or at reduced rates across the line of the Federal customs, in favour of the products of the zones, must be contemplated;

"That the declaration made in regard to this question by the Agent of the Swiss Government before the Court at the hearing on April 22nd, 1932, shall be placed on record;

"That January 1st, 1934, shall be appointed as the date by which the withdrawal of the French customs line shall have been effected."

By reason of Article 13 of its Statute the Court on this occasion was composed, as nearly as possible, of the same judges as sat at the first hearing of the case in 1929, and consisted of Judges Anzilotti, Loder,[2] Altamira, Oda,[2] Huber,[2]

---

[1] See *Year Book*, 1931, p. 159.

[2] Not members of the Court since 1931.

Hurst, Kellogg, Yovanovitch,[1] Beichmann,[1] Negulesco, and Dreyfus,[2] of whom the following dissented from the judgment: Altamira, Hurst, Yovanovitch, Negulesco, and Dreyfus.

JUDGMENT DELIVERED JUNE 24, 1932

Interpretation of the Memel Statute (Preliminary Objection).[3]

This case arose out of a difference of opinion between the United Kingdom, France, Italy, and Japan, on the one hand, and Lithuania on the other, as to whether certain acts of the Lithuanian Government were in conformity with the Statute of the Memel Territory annexed to the Memel Convention of 1924.

The questions in dispute, as defined in the application instituting proceedings filed by the four first named Powers, were as follows:

> "(1) Whether the Governor of the Memel Territory has the right to dismiss the President of the Directorate;
>
> "(2) In the case of an affirmative decision, whether this right only exists under certain conditions or in certain circumstances, and what those conditions or circumstances are;
>
> "(3) If the right to dismiss the President of the Directorate is admitted, whether such dismissal involves the termination of the appointments of the other members of the Directorate;
>
> "(4) If the right to dismiss the President of the Directorate only exists under certain conditions or in certain circumstances, whether the dismissal of M. Böttcher, carried out on February 6th, 1932, is in order in the circumstances in which it took place;
>
> "(5) Whether, in the circumstances in which it took place, the appointment of the Directorate presided over by M. Simaitis is in order;
>
> "(6) Whether the dissolution of the Diet, carried out by the Governor of the Memel Territory on March 22nd, 1932, when the Directorate presided over by M. Simaitis had not received the confidence of the Diet, is in order."

The Lithuanian Government took a preliminary objection to the jurisdiction of the Court to decide points (5) and (6), and the present judgment is confined to that question.

Article 17 of the Memel Convention provides as follows:

> "The High Contracting Parties declare that any member of the Council of the League of Nations shall be entitled to draw the attention of the Council to any infraction of the provisions of the present Convention.
>
> "In the event of any difference of opinion in regard to questions of law or of fact concerning these provisions between the Lithuanian Government and any of the Principal Allied Powers members of the Council of the League of Nations, such difference shall be regarded as a dispute of an international character under the terms of Article 14 of the Covenant of the League of Nations. The Lithuanian Government agrees that all disputes of this kind shall, if the other Party so requests, be referred to the Permanent Court of International Justice. There shall be no appeal from the Permanent Court's decision, which shall have the force and value of a decision rendered in virtue of Article 13 of the Covenant."

The case of the Lithuanian Government was that this article related to two distinct phases of one and the same procedure, and that, accordingly, all disputes before being referred to the Court must be submitted to the Council for examination, whereas points (5) and (6) had admittedly not been previously brought before the Council.

The judgment states that there is nothing in the text of Article 17 to show that it was the intention of the parties to make proceedings before the Council a condition precedent to proceedings before the Court. Indeed, the text itself shows that the two procedures relate to different objects, and there is a further distinction with regard to those who may initiate proceedings—any Member of the League in the one case; the Principal Allied Powers Members of the Council in the other.

---

[1] Not members of the Court since 1931.

[2] French judge *ad hoc*.

[3] Series A/B, No. 47.

The Lithuanian Government relied upon the history of the article. As to this, the Court refers to the rule it has repeatedly laid down, that preparatory work cannot be adduced to interpret a text which is, in itself, sufficiently clear. Moreover, the history of Article 17 did not, in the Court's opinion, provide any material which conflicts with the interpretation of the terms standing by themselves.

For these reasons, the preliminary objection was, by 13 votes to 3, overruled, and points (5) and (6) were reserved for judgment on the merits.

Judges Baron Rolin-Jaequemyns and Count Rostworowski, and M. Romer'is, judge *ad hoc*, dissented.

ORDER MADE AUGUST 3, 1932.

Legal Status of South-Eastern Greenland.[1]

Among other interlocutory Orders in this case, the present one calls for notice by reason of its subject-matter.

The substantive case concerned the legal validity of the occupation proclaimed by Norway on July 12, 1932, of the territory in question, sovereignty over which was claimed by Denmark. Both Denmark and Norway filed applications on July 18, 1932, submitting this issue to the Court,[2] and the Norwegian application contained a request that the Court should order interim measures of protection in accordance with Article 41 of the Statute. The present Order, made after hearing oral arguments, deals with this question.

Article 41 provides that: "the Court shall have power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of the parties".

The Court states that it is satisfied that it may proceed to indicate interim measures of protection both at the request of the parties (or of one of them) and *proprio motu.* The object of the measures contemplated by the Statute is, according to a previous ruling,[3] to preserve the respective rights of the parties pending the decision of the Court, in so far as the damage threatening these rights would be irreparable in fact or in law. The Norwegian Government argued that the Court was also competent to indicate interim measures for the sole purpose of preventing regrettable events and incidents. In the present case there was, however, no occasion to take a final stand upon this controversy, seeing that, from either point of view, the Court arrived at the same result—the Norwegian request was not based on the plea that the action which the Court was asked to prevent would prejudice some recognized or alleged Norwegian right; and there seemed no occasion to fear that the incidents contemplated by the Norwegian request would actually occur. Declarations had been made on both sides which were eminently reassuring, and the intentions so expressed had been officially repeated before the Court.

---

[1] Series A/B, No. 48, p. 277.

[2] The two suits were joined by Order of August 2, 1932, *ibid.*, p. 268. For a report of the substantive case, see p. 174, *infra.*

[3] Series A, No. 8, pp. 6–7.

For similar reasons, there was no occasion for the exercise by the Court of its power to indicate interim measures *proprio motu*, and in this connexion the Court recalled that both parties were bound by the General Act for the Pacific Settlement of International Disputes, under which they had undertaken "to abstain from measures likely to aggravate or extend the dispute", a clause as to the interpretation and application of which the Court has compulsory jurisdiction.

The Court accordingly (1) dismissed the request for the indication of interim measures of protection; (2) reserved the right subsequently to consider whether circumstances had arisen requiring such measures.

The decision was unanimous, including the national judges.

JUDGMENT DELIVERED AUGUST 11, 1932

Interpretation of the Memel Statute[1]

This was the decision on the merits of the case, reported on a preliminary point at p. 165, *supra*. By the Memel Convention of 1924 between the British Empire, France, Italy, and Japan of the one part, and Lithuania of the other part, the Four Powers transferred to Lithuania the sovereignty over the Memel Territory, subject to the conditions contained in the Convention. Under Article 2 the Memel Territory was to constitute, under Lithuanian sovereignty, a unit enjoying legislative, judicial, administrative, and financial autonomy within the terms prescribed by the Statute annexed to and forming part of the Convention.

The present dispute arose out of the dismissal of M. Böttcher, President of the Memel Directorate, the appointment of a new Directorate, and the dissolution of the Diet by the Lithuanian Governor of Memel, under the following circumstances.

The Directorate of Memel is the body which, under the Memel Statute, exercises the executive power in the Territory.

On December 17, 1931, M. Böttcher, accompanied by two members of the Chamber of Representatives, made a journey to Berlin. The expenses of the journey were defrayed out of the public funds of the Territory. One of M. Böttcher's companions had no passport, and was given a special certificate by the German Consul-General at Memel to the effect that the bearer was going to Berlin for negotiations with the German authorities and that these negotiations were of considerable interest to Germany. While at Berlin, M. Böttcher and his travelling companions had interviews with public officials at the German Food Ministry and also at the Ministry for Foreign Affairs.

When the Governor of Memel became aware of the facts, he informed M. Böttcher on December 27, 1931, that he (M. Böttcher) no longer possessed his (the Governor's) confidence and advised him to resign. On January 16, 1932, M. Böttcher replied that he thought that there was a misunderstanding about his journey to Berlin, and that the misunderstanding could easily be cleared up by a verbal discussion. He therefore asked for an interview.

Whether any such interview took place was not clear. But on January 25, 1932, the Governor reported the facts to the Memel Chamber of Representatives in a letter which was read to the Chamber that day, and M. Böttcher also made a statement. Thereupon the Chamber expressed its continued confidence in M. Böttcher by a vote of 15 to 4, with 6 abstentions. On February 6, the Governor dismissed M. Böttcher from the Presidency. The text of the letter addressed to M. Böttcher was as follows:

---

[1] Series A/B, No. 49.

> "On December 17th of last year you proceeded, without the knowledge of the Government of the Republic, to the capital of a foreign state, and there entered into negotiations with the Government of that state, disregarding in so doing the lawful authorities of your own state, who are alone entitled to engage in such negotiations. As a result of this conduct on your part, your continuance in the office of President of the Directorate is felt to be inconsistent with the interests of the state and to constitute a danger—as is indeed confirmed by the events of the last few days—to the public order of the state.
>
> "For these reasons, and in these exceptional circumstances, I feel compelled to cancel the Decree of January 8th, 1931, by which I appointed you President of the Directorate.
>
> "I take the opportunity of this notification to request you to hand over the duties of President of the Directorate to Councillor Tolisius, whom I have instructed to carry on the work of the presidency of the Directorate, until I have appointed a new President."

The other two members of the Directorate were also relieved of their offices.

On February 8, the German Government submitted the matter to the Council of the League under Article 17, paragraph 1, of the Memel Convention (see p. 165, *supra*) and the Council made certain recommendations.

On February 23, 1932, M. Böttcher forwarded to the Governor his resignation from the post of President of the Directorate and, on the same day, the leaders of the majority parties in the Memel Chamber informed the Governor that, as M. Böttcher had now resigned, they were prepared to suggest nominees for the post of President of the Directorate. The Governor had previously invited them to do so, but on February 10 they had informed the Governor that they were not able to do so.

On February 27 the Governor appointed as President of the Directorate M. Simaitis, a non-party man.

The leaders of the majority parties appear at the time to have been content with the appointment of M. Simaitis, and for a fortnight they negotiated with him in order to agree upon the composition of a new Directorate. On March 12, however, the negotiations broke down and the leaders of the majority parties informed the Governor that they would no longer accept M. Simaitis as President of the Directorate, but were willing to negotiate as to the formation of a Directorate on a parliamentary basis. M. Simaitis then formed his Directorate with two persons who were not members of the majority parties. The Directorate so formed by M. Simaitis submitted itself to the Chamber on March 22. The Chamber, after hearing a statement from the Directorate, refused its confidence by a vote of 22 to 5. M. Simaitis then read a decree of the Governor dissolving the Chamber.

The Four Powers shortly afterwards instituted the present proceedings before the Court by an application raising the six points set out at p. 165, *supra*.

The judgment of the Court, after criticizing the abstract form in which some of the questions are framed, proceeds to deal with Point No. 1. This, it is observed, depends upon the provisions of the Memel Convention and Statute as a whole. It certainly was not the intention of the parties that the sovereignty over Memel should be divided between two bodies which were to exist side by side in the same territory. Their intention was simply to ensure to the transferred territory a wide measure of decentralization, which should not disturb the unity of the Lithuanian State and should operate within the framework of Lithuanian sovereignty.

Whilst Lithuania was to enjoy full sovereignty over the ceded territory, subject to the limitations imposed on its exercise, the autonomy of Memel was only to operate within the limits so fixed and expressly specified.

Article 7 of the Statute provides that:

> "The affairs which, under the present Statute, are not within the jurisdiction of the local authorities of the Memel Territory shall be within the exclusive jurisdiction of the competent organizations of the Lithuanian Republic."

It was therefore clear that, in the absence of provisions to the contrary, the rights ensuing from the sovereignty of Lithuania must apply as regards the Memel Territory.

For the purpose of its autonomy, i.e. for the purpose of managing its local affairs as it pleases, the Memel Territory is provided under the Statute with a legislature, an executive, and a judiciary. Provision is also made for a Governor who represents the Lithuanian Government and plays, as Governor, a defined but important part in the local life of Memel.

Article 17 of the Statute provides as follows:

> "The Directorate shall exercise the executive power in the Memel Territory. It shall consist of not more than five members, including the President, and shall be composed of citizens of the Territory.
>
> "The President shall be appointed by the Governor and shall hold office so long as he possesses the confidence of the Chamber of Representatives. The President shall appoint the other members of the Directorate. The Directorate must enjoy the confidence of the Chamber of Representatives and shall resign if the Chamber refuses it its confidence. If, for any reason, the Governor appoints a President of the Directorate when the Chamber of Representatives is not in session, it shall be convened so as to meet within four weeks after the appointment to hear a statement from the Directorate and vote on the question of confidence."

The Court held that "executive power" here must be read as restricted to executive power in respect of matters within the competence of the Memel authorities, otherwise it would be in flagrant contradiction with the provisions of Article 7.

What should next be noted is the absence of any provisions as to what is to happen if acts of the executive authority at Memel exceed the competence of the authorities of the Territory. There is nothing to correspond to the veto on legislation exceeding the competence of those authorities.

It cannot have been the intention of the Convention to leave Lithuania, the sovereign of the Memel Territory, with no remedy whatever if the executive authorities at Memel violated the Statute by acting in a manner beyond their powers.

It was argued on behalf of the Four Powers that even if it be assumed that the Lithuanian Government has some remedy if the executive authorities at Memel exceed their competence, that remedy cannot be the dismissal of the President of the Directorate, if the Chamber supports him, because of the provision in Article 17, which says that the President shall hold office so long as he possesses the confidence of the Chamber.

The Court held that this provision could not be isolated from the rest of the article in which it figures. The purpose of that article is to make provision for the exercise of the executive power in the Memel Territory. The executive power is the power to carry out all such executive acts as fall within the competence of the Memel authorities. The right to continue to hold office which this provision accords to the President of the Directorate is accorded to him for the purpose of enabling him to carry out those acts. To place upon these words the meaning that the right so conferred upon the President of the Directorate is absolute and persists in all cases so long as the Chamber supports him, would result in a President being able to flout the authorities of the Lithuanian Government so long as he carried the Chamber with him. Such an interpretation would destroy the general scheme of the Convention and Statute under which Memel was to enjoy autonomy within defined limits, but was placed under the sovereignty of Lithuania. Both the autonomy as defined and the sovereignty were intended to be effective.

The dismissal of the President of the Directorate by the Governor would constitute a legitimate and appropriate measure of protection of the interests of the state only in cases in which the acts complained of were serious acts calculated to prejudice the sovereign rights of Lithuania and violating the provisions of the Memel Statute, and when no other means are available.

Whether or not such a situation exists as calls for so extreme a measure as the dismissal of the President of the Directorate is primarily a question for the Governor to determine. But his decision would not be final. It would not prejudice the right of any Power concerned to take such steps as may be open to it under Article 17 of the Convention.

Within the limits explained above, the Convention and Statute must be interpreted as giving the Governor the right to dismiss the President of the Directorate.

With regard to Point No. 2 (see p. 165, *supra*), the Court observed that it could do no more than refer to the principle laid down above. The question whether or not circumstances justifying dismissal were present would always depend upon the facts of the particular case.

With regard to Point 3, the Court held that the dismissal of the President does not by itself involve the termination of the appointments of the other members of the Directorate.

As to Points 4 and 5, the Court, after examining the facts, came to the conclusion that the answer, in each instance, was in the affirmative.

As to Point 6, the Court referred to Article 12 (5) of the Memel Statute, which provides as follows:

> "The Chamber may be dissolved by the Governor in agreement with the Directorate. The elections to the new Chamber shall take place within six weeks from the dissolution."

The intention of this provision was clear. The Governor is not entitled under the Statute to dissolve the Chamber on his own authority. It requires the concurrence of the Directorate. What is the reason for requiring the consent of the Directorate? Bearing in mind the importance which is attached in Article 17 of the Statute to the Directorate possessing the confidence of the Chamber, it is a fair deduction that the reason why a dissolution was not to take place without the consent of the Directorate was in order to ensure that the local elements should have some voice in the decision whether or not the Chamber should be dissolved.

In the present case the Directorate did not have the confidence of the Chamber when the latter was dissolved and the Court decided that, in accordance with the intention of Article 12, the dissolution must be held not to have been in order.

The Court observed in conclusion that its function in the present case was limited to that of interpreting the Memel Statute in its treaty aspect. It had arrived at the conclusion that on the proper construction of the Statute the Governor ought not to have taken certain action which he did take. It did not thereby intend to say that the action of the Governor in dissolving the Chamber, even though it was contrary to the treaty, was of no effect in the sphere of municipal law. This was tantamount to saying that the dissolution was not to be regarded as void in the sense that the old Chamber was still in existence, and that the new Chamber since elected had no legal existence. The Court was satisfied that the intention of the Four Powers was only to obtain an interpretation of the Statute which would serve as a guide for the future.

Six of the fifteen judges who heard this case dissented in part, and one in whole, from the judgment of the Court.

Advisory Opinion Delivered November 15, 1932

Interpretation of the Convention of 1919 concerning Employment of Women during the Night[1]

By a Resolution dated May 9, 1932, the Council of the League submitted to the Court the following question:

> "Does the Convention concerning employment of women during the night, adopted in 1919 by the International Labour Conference, apply, in the industrial undertakings covered by the said Convention, to women who hold positions of supervision or management and are not ordinarily engaged in manual work?"

Article 3 of the Convention provides as follows:

> "Women without distinction of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed."

Questions had been raised as to the operation of this provision as early as 1928, when the Government of the United Kingdom drew the attention of the International Labour Organization to the difficulty caused by the fact that, according to their view, the effect of Article 3 was to debar women altogether from entering upon certain employments, one instance being that of female engineers in electrical power undertakings. H.M. Government proposed that the Convention should be revised to meet this point. Discussions took place in the Governing Body of the I.L.O., in the course of which it appeared that great divergence of opinion existed both as to the interpretation of the Convention and as to the desirability of revision, a number of Governments considering that the Convention as it stood did not preclude the employment of non-manual workers holding responsible positions. The proposal for revision was placed on the agenda of the International Labour Conference of 1931, but failed to obtain the necessary two-thirds majority, and the British Government then moved the Governing Body to request the Council to obtain an advisory opinion from the Court as to the true interpretation of the Convention.

The following presented written and oral statements to the Court: H.M. Government, the German Government, the I.L.O., the International Federation of Trades Unions, and the International Confederation of Christian Trades Unions. The broad question involved in this case was whether the Convention was to be interpreted according to its actual terms or whether, by reason of its history or otherwise, it was to be read as applying only to manual workers.

---

[1] Series A/B, No. 50.

The Court observes, in its Advisory Opinion, that the wording of Article 3, considered by itself, gives rise to no difficulty; it is general in its terms and free from ambiguity or obscurity. It prohibits the employment during the night in industrial establishments of women without distinction of age. Taken by itself, it necessarily applies to the categories of women contemplated by the question submitted to the Court. If, therefore, Article 3 of the Washington Convention is to be interpreted in such a way as not to apply to women holding posts of supervision and management and not ordinarily engaged in manual work, it is necessary to find some valid ground for interpreting the provision otherwise than in accordance with the natural sense of the words. There was nothing in the rest of the Convention in any way inconsistent with the clear terms of Article 3.

The Court considered, in the first place, whether Article 3 should be given a restricted meaning because of the fact that the Convention is a Labour Convention, i.e. one prepared within the framework of Part XIII of the Treaty of Versailles. This ground was rejected. It could clearly not be maintained that the Convention was not valid because its terms are wide enough to cover persons other than those engaged in manual work; and it would not be sound to argue that, as the improvement of the lot of the manual workers was the aim of Part XIII, a provision in a Labour Convention couched in general terms must be assumed to be intended to apply only to manual workers. As the Court itself had previously held, the sphere of activity of the I.L.O. is not so closely circumscribed as to raise any such presumption.

The main argument before the Court in support of the restrictive interpretation was based upon the connexion between the Washington Convention and the Berne Convention of 1906. It was said that the Berne Convention covered only women engaged in manual work, that the Washington Convention was a mere extension and application of the Berne Convention and, therefore, must be subject to a similar restriction. The Court pointed out that the weakness of this line of argument was that the text of the Washington Convention makes no reference to the Berne Convention, and that there is nothing to link the two so intimately as to require that the terms of the Washington Convention should bear the same meaning as those of the Berne Convention, even if the Berne Convention bore the meaning suggested, as to which the Court expressed no opinion.

Another point raised was that in 1919 very few women actually held positions of supervision or management in industrial undertakings, and that the application of the Convention to such women was never considered. As to this, the Court observes that the mere fact that, at the time when the Convention was concluded, certain facts or situations, which the terms of the Convention in their ordinary meaning are wide enough to cover, were not thought of, does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms.

The Court examined the preparatory work of the Convention for the purpose of seeing whether it confirmed the confident opinions expressed by certain delegates during the discussions in 1930 and 1931 that the Convention applied only to working women (*ouvrières*). The Opinion, however, expressly states that in doing so, the Court did not intend to derogate in any way from the rule laid down on previous occasions that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself.

The result of this examination was to confirm the conclusion reached on a study of the text itself that there was no good reason for interpreting Article 3 otherwise than in accordance with its natural meaning.

Finally, the Court referred to the fact that the Washington Hours Convention, negotiated at the same time as the Night Work of Women Convention, contains an express provision that the Hours Convention should not apply to persons holding positions of supervision or management, nor to persons employed in a confidential capacity. If it was necessary to make this exception in the Hours Convention, it was equally necessary to make a corresponding exception under the present Convention if it was intended to exclude women holding positions of supervision or management.

For these reasons the Court answered the question set out above in the affirmative.

Judges Baron Rolin-Jaequemyns, Count Rostworowski, Fromageot, Anzilotti, and Schücking dissented.

ORDER MADE FEBRUARY 4, 1933

Administration of the Prince von Pless (*Preliminary Objection*).[1]

By application dated May 18, 1932, Germany launched proceedings before the Court against Poland founded upon alleged breaches by the Polish Government of the Geneva Convention concerning Upper Silesia in regard to the administration of the Prince von Pless, a Polish national belonging to the German minority in Upper Silesia.

The following points were raised:

1. That the attitude of the Polish Government towards the Pless Administration in the matter of income taxes for the years 1925–30 was in conflict with certain provisions of the Convention.
2. That acts of the Polish fiscal authorities in conflict with the Convention were, according to Article 65 thereof, null and void.
3. That the Polish Government was bound to indemnify the Prince for the resulting damage.
4. That the Pless Administration was entitled to full liberty to appoint its employees regardless of race and language without being exposed to pressure by the Polish authorities.

The Polish Government took a preliminary objection to the suit on the ground that there did not exist a difference of opinion between the German and Polish Governments within the meaning of Article 72 (3) of the Convention, which gives the Court compulsory jurisdiction in regard to any difference of opinion as to questions of law or fact arising out of the Convention between the Polish Government and any Member of the Council of the League of Nations. According to the Polish view the acts complained of under (1) above related only to a dispute between the Polish Treasury and the Prince as a tax-payer; and as regards point (4) the Polish Government was in agreement with the German Government as to the principle and denied that it had been violated.

After hearing arguments the Court, by the present Order, held that the question whether there was a difference of opinion within the meaning of Article 72 (3) so as to give rise to the jurisdiction was inextricably bound up with the facts of the case and could only be decided on the basis of a full knowledge of these facts such as could only be obtained from the proceedings on the merits. It was therefore ordered that the preliminary objection should be joined to the merits of the suit, so as to enable the Court to pass upon the objection, and if this was overruled, upon the merits in a single judgment.

---

[1] Series A/B, No. 52.

Two further points were dealt with in the Order. (*a*) The Court felt called upon to raise *proprio motu* the question (which was reserved for decision in the judgment) whether, under Article 72 (3) of the Convention, a state, in its capacity of a member of the Council, may claim an indemnity for a national of the respondent state who is a member of the minority. (*b*) The Polish Government took, as a second ground of objection to the jurisdiction, the plea that the Prince von Pless had not exhausted the means of redress open to him under Polish law. It was common ground that appeals relating to the taxes payable by the Prince were pending before the Supreme Polish Administrative Tribunal. As to this the Court held that it was not necessary to decide whether the principle alluded to was applicable since, in any event, it would certainly be an advantage to the Court to be acquainted with the final decisions of the highest Polish tribunal; and the time limits for the completion of the written procedure were accordingly fixed so as to allow these decisions to be given before the case came up for adjudication by the Court.

The decision was unanimous.

Judgment Delivered April 5, 1933[1]

Legal Status of Eastern Greenland

On July 10, 1931, Norway issued a proclamation declaring that the occupation of a part of Eastern Greenland was officially confirmed and that this territory was placed under Norwegian sovereignty. Two days later Denmark filed an Application under the Optional Clause, to which both Norway and Denmark are parties, asking the Court to adjudge that this action on the part of Norway constituted "a violation of the existing legal situation and was accordingly unlawful and invalid". The territory in question, which is sometimes known as Eric the Red's land, is situated between Carlsberg Fjord on the south and Bessel Fjord on the north, on the east coast of Greenland, and extends from latitude 71° 30′ to 75° 40′ N.

Greenland, which is now known to be an island, was discovered about A.D. 900, and the west coast was colonized about a century later by Eric the Red, an inhabitant of Iceland of Norwegian origin. The settlements became tributary to the kingdom of Norway in the thirteenth century, but they had disappeared before 1500.

In 1380 the kingdoms of Norway and Denmark were united under the same Crown, a situation which continued down to 1814, but in so far as Greenland constituted a dependency of the Crown during this period, it must be regarded as having been a Norwegian possession. The disappearance of the Nordic colonies did not put an end to the King's pretensions to sovereignty over Greenland, and foreign countries acquiesced in the King's claims. Various unsuccessful efforts at renewed colonization were made from time to time, but in 1721 a new colony was actually founded by Hans Egede, a Norwegian, and a concession was given to his "Greenland Company" by the King of Denmark. From that time forward colonies were established and maintained on the west coast, and the King's sovereignty over them was clearly provided for by legislative and other measures. According to the Norwegian contention before the Court this sovereignty only extended to the colonized parts—namely, the west coast—but the Court held that where the instruments in question spoke, as they did, of "Greenland", the name was used in the geographical sense, and related to the whole island and that there was, at any rate, a clear pretension to sovereignty over the whole country.

---

[1] Series A/B, No. 53.

The Napoleonic era wrought great changes in the status of the Scandinavian countries which culminated in the defeat of Denmark by Sweden, and the conclusion of the Treaty of Kiel, signed on January 14, 1814, whereby the kingdom of Norway was ceded by Denmark to Sweden. Greenland was, however, expressly excepted from the cession with the result that the rights of Norway over the island, whatever they were at that date, passed to Denmark. In the course of the nineteenth and early twentieth centuries the coasts of Greenland were entirely explored by navigators of various nationalities. Several Danish expeditions were made from time to time which together explored the whole of the east coast. Concessions were granted by the Danish Government for the establishment of trading and hunting stations on the east coast, but it was not until 1894 that a Danish settlement was established there, at Angmagssalik, some considerable distance south of Eric the Red's land. Notice of this was given to the Minister of Foreign Affairs of the United Kingdoms of Sweden and Norway, and to some other states. In 1925 another Danish trading and mission station was established on the east coast at Scoresby Sound, between Angmagssalik and the territory in dispute. Throughout this period the Danish Government had been issuing Decrees under which authority was claimed over the whole of Greenland, and in negotiating commercial and other treaties it was the practice of that Government to secure the insertion of a stipulation excluding Greenland—without qualification—from the operation of the instrument.

As regards Norwegian activities, in addition to visits to the east coast paid periodically during the summer from 1889 onwards, expeditions wintered in the territory in question in 1908, 1909, 1922, and in 1926 and the ensuing years. A wireless station was established and a large number of houses and cabins were built.

During the Great War Denmark ceded to the United States her West Indian Islands and, in connexion with the negotiations, broached the question of the extension of Danish activities throughout Greenland. As the result a declaration was signed on the same date as the treaty of cession, stating that the United States would not object to the Danish Government extending their political and economic interests to the whole of Greenland.

In July, 1919, conversations took place between Denmark and Norway in connexion with Norway's claim to Spitzbergen which was then before the Peace Conference in Paris. The Danish Minister at Oslo saw M. Ihlen, the Norwegian Minister of Foreign Affairs, and informed him that Denmark, having no special interests in Spitzbergen, would raise no objection to Norway's claims, but pointed out at the same time that the Danish Government had been anxious for some years past to obtain recognition of Denmark's claim over the whole of Greenland and intended to place that question before the Conference, and felt confident that this would not encounter any difficulties on the part of the Norwegian

Government. M. Ihlen replied that "the plans of the Danish Government respecting Danish sovereignty over the whole of Greenland would meet with no difficulties on the part of Norway". This "Ihlen declaration" figured largely in the arguments before the Court.

The intention to lay the Greenland question before the Peace Conference was not pursued, but in 1920 the Danish Government approached the Great Powers (other than the United States) and obtained assurances on the subject of the recognition of Denmark's sovereignty over the whole of Greenland. Sweden was also approached and made no difficulty, but the Norwegian Government was not prepared to adopt the same attitude unless it received an undertaking that the liberty of hunting and fishing on the east coast (outside the limits of the colony of Angmagssalik), which Norwegians had hitherto enjoyed, should not be interfered with. This undertaking the Danish Government was unwilling to give, and on May 10, 1921, they issued a Decree stating that the whole country was henceforth linked up with Danish colonies and stations under the authority of the Danish Administration of Greenland. Diplomatic correspondence between the Danish and Norwegian Governments ensued in which Denmark remained firm in her claim to sovereignty, whereas on the Norwegian side it was gradually made clear that, in the opinion of the Norwegian Government, the uncolonized part of the east coast of Greenland was a *terra nullius*.

On July 9, 1924, a Convention was signed between Denmark and Norway establishing a *modus vivendi*. Freedom to land, winter, hunt, and fish on the east coast, except the district of Angmagssalik, was to prevail for a period of twenty years, but this arrangement was to be without prejudice to the legal contentions of both parties.

Soon after this, Denmark promulgated laws relating to Greenland which occasioned Norwegian protests, and in 1930 the Norwegian Government conferred police powers on certain of its nationals "for the inspection of the Norwegian hunting stations in Eastern Greenland", which the Danish Government intimated that it could not countenance. Denmark also inaugurated a "three years' plan" for scientific research in Eastern Greenland which aroused misgivings in Norway. The Norwegian Government asked for an assurance that during the life of the above-mentioned Convention no police authority, or other act of sovereignty, whether Danish or Norwegian, should be established or done in Eastern Greenland. The Danish Government refused and proposed a reference of the dispute to the Court. Whilst negotiations for this purpose were taking place, on June 28, 1931, certain Norwegian hunters hoisted the Norwegian flag in Mackenzie Bay and announced that they had occupied the territory in dispute. This was followed by the official declaration of occupation of July 10, 1931, which, in a note to the Danish Minister, the Norwegian Foreign Office explained as being necessary "having regard to the legal position of Norway in the proceedings before the Court". Norway notified the interested Powers of the proclamation of occupation, and Denmark instituted the present proceedings.

Denmark contended before the Court that the Norwegian occupation was invalid because the area occupied was at the time of the occupation subject to Danish sovereignty, which existed over the whole of Greenland; consequently the territory in dispute could not be occupied by another Power.

In support of this contention, the Danish Government advanced two propositions. The first was that the sovereignty which Denmark now enjoys over

Greenland had existed for a long time, had been continuously and peacefully exercised, and, until the present dispute, had not been contested by any Power. The second proposition was that Norway had by treaty or otherwise herself recognized Danish sovereignty over Greenland as a whole and therefore could not now dispute it.

The Norwegian submissions were that Denmark possessed no sovereignty over the area which Norway occupied on July 10, 1931, and that at the time of the occupation the area was *terra nullius*. Her contention was that the area lay outside the limits of the Danish colonies in Greenland, and that Danish sovereignty extended no farther than the limits of these colonies.

The judgment of the Court, after observing that the date at which Danish sovereignty must have existed in order to render the Norwegian occupation invalid was the date of the occupation, July 10, 1931, points out that the Danish claim is not founded upon any particular act of occupation, but alleges a title "founded on the peaceful and continuous display of State authority over the island".[1] It is based upon the view that Denmark now enjoys all the rights which the King of Denmark and Norway enjoyed over Greenland up till 1814.

It must be borne in mind, however, that as the critical date is July 10, 1931, it is not necessary that sovereignty over Greenland should have existed throughout the period during which the Danish Government maintains that it was in being. Even if the material submitted to the Court might be thought insufficient to establish the existence of that sovereignty during the earlier periods, this would not exclude a finding that it is sufficient to establish a valid title in the period immediately preceding the occupation.

The Court states that a claim to sovereignty, based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority. Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger. One of the peculiar features of the present case was that up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland. Indeed, up to 1921, no Power disputed the Danish claim to sovereignty. The records of the decisions in cases as to territorial sovereignty show that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other state could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.

The judgment then refers to the facts summarized above and comes to the conclusion that as regards the earlier period the King's claims amounted merely to pretensions, for he had no permanent contact with the country and was exercising no authority there. But there was no claim on behalf of any other Power to compete with these pretensions.

---

[1] See *Island of Las Palmas Arbitration*, Permanent Court of Arbitration, A.J. 1928; *Annual Digest 1927–8*, Case No. 68.

After the founding of Hans Egede's colonies in 1721, there was in part, at least, of Greenland a manifestation and exercise of sovereign rights. Consequently, both the elements necessary to establish a valid title to sovereignty—the intention and the exercise—were present, but the question arises as to how far the operation of these elements extended.

The King's pretensions to sovereignty which existed at the time of the foundation of the colonies are sufficient to demonstrate the intention, and, as said above, these were not limited to any particular part of the country.

Was the exercise of sovereign rights such as to confer a valid title to sovereignty over the whole country? The founding of the colonies was accompanied by the grant of a monopoly of the trade, and before long legislation was found to be necessary to protect and enforce the monopoly. In the earlier Ordinances of 1740–51, issued at the time when Jacob Severin was the grantee of the monopoly, the prohibition of trading was restricted to the colonies, but those Ordinances also contained a prohibition of injurious treatment of the Greenlanders, and this was not limited to the colonies but operated in Greenland as a whole. Furthermore, the prohibition of trading was to apply not only in the existing colonies but in any future colonies which might be established. Legislation is one of the most obvious forms of the exercise of sovereign power, and it was clear that the operation of these enactments was not restricted to the limits of the colonies. It therefore followed that the sovereign right in virtue of which the enactments were issued cannot have been restricted to the limits of the colonies.

The Ordinance of 1758 and that of 1776 (which is still in force) also operated beyond the limits of the colonies: under these Ordinances, the prohibition on trading is no longer restricted to the colonies but is to apply "in all places whatever". This extension in the area of the monopoly was reflected in the terms of the commercial treaties of the period.

The Court concludes that, bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed during the period from the founding of the colonies by Hans Egede in 1721 up to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area.

With regard to the period subsequent to the Treaty of Kiel of 1814 the judgment lays stress upon the commercial treaties of Denmark in which Greenland is expressly mentioned as part of the King's dominions. These treaties show a willingness on the part of other states to admit Denmark's right to exclude Greenland, and Denmark is entitled to rely on them as evidence of recognition of her sovereignty. They also demonstrate sufficiently Denmark's will and intention to exercise sovereignty over Greenland. There remains the question whether during this period, i.e. 1814 to 1915, she exercised authority in the uncolonized area sufficiently to give her a valid claim to sovereignty therein. After reviewing the concessions and legislation of the period the Court holds that, when taken in conjunction with the above-mentioned treaties and the absence of all claims to sovereignty over Greenland by any other Power, this question must be answered in the affirmative.

The Court then turns to the applications which the Danish Government addressed to foreign governments between 1915 and 1921, seeking the recognition of her position. The terms of the correspondence are not always clear, and one of the phrases used, which speaks of "extension of sovereignty", if taken by itself, was very difficult to reconcile with the view now upheld by the Danish Government. But the Court was of opinion that too much importance must not be attached to particular expressions here and there. The correspondence must be judged as a whole, and if this was done the conclusion emerged that the object which the Danish Government was endeavouring to secure was an assurance from each of the foreign governments concerned that it accepted the Danish point of view that all Greenland was already subject to Danish sovereignty and was, therefore, content to see an extension of Denmark's activities to the uncolonized parts of Greenland.

After a detailed examination of all the material documents the Court decided that there could be no ground for holding that, by the attitude which the Danish Government adopted, it admitted that it possessed no sovereignty over the uncolonized part of Greenland, nor for holding that it was estopped from claiming that Denmark possessed an old-established sovereignty over all Greenland.

After 1921 there was a considerable increase in the activity of the Danish Government on the eastern coast. The Court reviews the various measures taken, and holds that during this time Denmark regarded herself as possessing sovereignty over all Greenland, and displayed and exercised her sovereign rights to an extent sufficient to constitute a valid title. When considered in conjunction with the facts of the preceding periods, the case in favour of Denmark was confirmed and strengthened.

From the above it followed that Denmark had succeeded in establishing her contention that at the critical date, namely July 10, 1931, she possessed a valid title to the sovereignty over all Greenland.

This finding constituted by itself sufficient reason for holding that the occupation of July 10, 1931, and any steps taken in this connexion by the Norwegian Government, were illegal and invalid.

The Court then considered the Danish contention that Norway had given certain undertakings which recognized Danish sovereignty over all Greenland. The most important of them was the "Ihlen declaration" referred to above. This was relied upon by Denmark as a recognition of an existing Danish sovereignty in Greenland. The Court was unable to accept this point of view. A careful examination of the words used, and of the circumstances in which they were used, as well as of the subsequent developments, showed that M. Ihlen cannot have meant to be giving then and there a definitive recognition of Danish sovereignty over Greenland, and showed also that he cannot have been understood by the Danish Government at the time as having done so. But the Court was of opinion that the declaration did constitute an engagement obliging Norway to refrain from occupying any part of Greenland. The Court considered it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs. The promise was unconditional and definitive.

For the reasons summarized above, the judgment of the Court was that "the declaration of occupation promulgated by the Norwegian Government on July 10, 1931, and any steps taken in this respect by that Government constitute a violation of the existing legal situation and are accordingly unlawful and invalid".

The decision was given by 12 votes to 2, Judge Anzilotti and M. Vogt, Judge *ad hoc*, dissenting. The applications made on either side for costs were rejected, the general rule that each party should bear its own costs being adhered to.

ALEXANDER P. FACHIRI.

AN ARBITRATION CASE BETWEEN THE UNITED STATES AND SWEDEN

By a special agreement between the United States and Sweden, the ratifications of which were exchanged on October 1, 1931, the claim of Sweden for damages amounting to $3,012,173 on account of the alleged detention by the United States in 1917 and 1918 of two Swedish motor ships, the *Kronprins Adolf* and the *Pacific*, was submitted to arbitration in pursuance of the Hague Convention of 1907 and the Swedish-American arbitration convention of 1928. This was the nineteenth case submitted to arbitration under the Hague Conventions of 1899 and 1907. The arbitrator agreed upon by the parties was Professor Eugène Borel of Switzerland. He was asked to decide, first, whether the two vessels were "detained" by the Government of the United States in contravention of the Swedish-American treaties of April 3, 1783, and July 4, 1827, and if so, whether the United States was liable for the damages sustained by the owners, a Swedish corporation, on account of the detention. If both questions were decided in the affirmative, the arbitrator was to fix the amount to be paid by the United States to Sweden.

The arbitrator rendered his award at Washington on July 18, 1932, holding that the vessels were not detained in contravention of the treaties, consequently it was unnecessary to answer the second and third questions.[1] As the arbitrator remarks, the question presented "a very large number of disputed questions of fact, as well as numerous and difficult points of law".

At the outset a question was raised concerning the admissibility of certain evidence upon which the Swedish Government relied in support of its contention that the vessels were detained in violation of the treaties. This evidence consisted of certain affidavits relating to events which took place in the years 1917 and 1918. The Government of the United States took the position that, since fourteen years had elapsed since the facts to which they related had occurred, they "could not be relied upon as acceptable evidence". The arbitrator held that the affidavits were admissible though subject to the qualification that they could not be given the same weight as "authentic exhibits" dating from the years 1917 and 1918; consequently he would consider such oral evidence only in so far as it corroborated the documentary evidence dating from the time concerned. Another preliminary question raised arose out of the position taken by the United States to the effect that the arbitrator could not base his award on principles of international law as such, since his jurisdiction was limited to a consideration of the question whether provisions of any of the two treaties involved had been contravened. The arbitrator admitted that the position of the United States was just in itself, but in order that there might be no misapprehension he felt obliged to observe that while the award must be based on the treaties, the treaties themselves were a part of international law as accepted by the parties, and it could be safely assumed that when they were concluded "both parties considered them as being agreed upon as special provisions to be enforced between them in what may be called the atmosphere and spirit of international law as recognized by both of them".

---

[1] The text of the award is published in the *American Journal of International Law*, Vol. XXVI (October 1932), pp. 834 ff.

The United States in support of its case laid particular stress on the preamble of the treaty of 1783, which affirmed that the purpose of the parties in concluding the treaty was to relieve each other from certain burdens and embarrassments in respect to navigation in the ports of the other "by leaving each party at liberty to make respecting navigation and commerce those interior regulations which shall be most convenient to itself". In the opinion of the United States this indicated an intention on the part of both countries that the chief object of the treaty was clearly to maintain and safeguard the sovereignty of each state.

The arbitrator thought this view too extreme, since, if that had been the object, no treaty would have been necessary to accomplish it. Nevertheless, "considering the natural state of liberty and independence which is inherent in sovereign states, they are not to be presumed to have abandoned any part thereof"; consequently the provisions of the treaty, where there was doubt, must be interpreted in favour of such liberty and independence. For reasons which cannot be given in full here the arbitrator decided that the vessels had not been "detained". Stress was laid on the fact that no application was ever made to the proper official for clearance for either vessel, apparently in the belief that in view of the attitude of the American authorities it would have been denied. "A claim for damages asserted by a government on behalf of a national", said the arbitrator, "cannot rest on mere declarations of intentions or of policy on the part of the authorities; the proper foundation for such a claim is an act, a decision taken with regard to such national and of a nature incompatible with his treaty rights—the anticipation of a refusal, however justified, cannot be accepted as relieving one from the obligation of making the application". Nor can it be admitted that an oral intimation by an official as to how he will act in a case, has the effect of dispensing with the procedure validly prescribed and the making of applications properly required by regulations in force.

ARBITRATION OF SABOTAGE CASES IN THE UNITED STATES

The *Year Book* for 1931 (p. 171) contained a note on an award of the German-American Mixed Claims Commission which rejected the claims of the United States for damages amounting to $120,000,000 for the destruction in 1916 and 1917, alleged to have been the work of German agents, of a railroad terminal and a factory both containing a large amount of munitions and shells awaiting shipment to certain of the Allied and Associated Powers. The American agent, being dissatisfied with the award, filed a petition with the commission for a rehearing, on the ground that the Commission had "committed manifest errors in its findings of fact on the evidence submitted and in failing to apply important established principles of law", and also on the ground that the award was "irregularly rendered because the umpire participated in the deliberations of the national commissioners and in the opinion of the commission". Upon the rehearing, which was granted, the Commission overruled the latter objection, but the two national commissioners were divided on the question as to whether the new evidence submitted established the truth of the American contention that the persons charged with starting the fire were German agents. This question was therefore submitted to the umpire, Mr. Justice Roberts of the United States Supreme Court. In the new evidence submitted, incendiary pencils, letters written by the alleged German agent from Mexico, certain cheque-books, and a message written in lemon juice on the cover of a magazine, which was made visible by the application of heat, were relied upon by the American agent to establish the contention that the accused was a German agent. The umpire, however, held that the evidence did not convince him on this point, and the burden of proof being on the American Government it had failed to discharge the burden. The case was accordingly dismissed.

James W. Garner.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW

DECISIONS OF THE ENGLISH COURTS DURING THE YEAR 1932 [1]

THE most interesting cases of the year under review are the "Russian Bank cases". They raise questions of Private International Law and comity—on some points bordering on Public International Law. The series began with a decision of the Court of Appeal (recently confirmed by the House of Lords—Case No. 1 below), holding that a Russian bank, incorporated under the law of Czarist Russia, had by reason of Soviet Russian legislation ceased to exist as a juristic person before 1930. Since then the Law Reports show that the English courts have come to a similar conclusion with regard to two other Russian banks and a Russian trading corporation (see Cases Nos. 2, 3, 4, and 5 below). There are, however, no doubt other similar cases unreported or still awaiting decision. It is well known that in 1925 the House of Lords had held, in the case of two other Russian banks, that the effect of the Soviet nationalization decrees had been to put the banks into liquidation, but that these decrees had not had the effect of terminating the existence of the corporations as juristic persons in 1920.[2] This judgment of the House of Lords was followed by a number of other decisions of the English courts in which the effect of the Soviet decrees relating to insurance companies, shipping companies, and trading companies was held to be the same.[3] There is, however, no inconsistency—

---

[1] In general all cases reported in the English Law Reports for 1932 and in contemporary English reports covering the same period are reviewed in this number of the *Year Book*; cases which may be expected to appear in the Law Reports for 1933 are reserved for next year, although they may have appeared already in other reports (*The Bathori*, [1933] P. 22, and *The Administrator of German Property* v. *Knoop*, 49 T.L.R. 109, and certain other cases fall into this class). The decision of the House of Lords in the case of *Lazard Bros.* v. *The Midland Bank*, which has only recently been given, and certain other Russian company cases which have as yet only appeared in other reports for 1933, are, however, included in order to deal more comprehensively with a connected series of cases. Two Scottish and one Irish case given in the years 1930 and 1932 have also been included, since they deal with questions of Private International Law by the application of principles similar to those applied by the English courts.

For the more important or interesting cases short digests are given as well as a note or comment; in other cases no digest is added.

[2] In the case of *The Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112, the House of Lords held, on the evidence of Russian law then before them, that the Defendants had not discharged the onus of proof which was on them to prove that the plaintiff Bank, a company incorporated in Russia, had in 1920 ceased to exist as a juristic person by reason of the Soviet decrees. The evidence was taken in 1921, and no Soviet decrees later in date than January 1920 were referred to: there was a branch of the Russian Bank in England which had continued, after the Soviet revolution and notwithstanding the Soviet decrees, to carry on some business, and this branch was in correspondence with a body in Petrograd called the Liquidating Committee of the Russian Commercial and Industrial Bank, and was in the years 1920–4 being wound up by the English courts.

In the case of the *Banque Internationale de Commerce de Petrograd* v. *Goukasson*, [1925] A.C. 150, the House of Lords came to the same conclusion with regard to another Russian bank which had a branch in Paris which had continued to carry on business till 1920 or later—namely that the Defendant had failed to prove that this bank had ceased to exist as a juristic person in 1920.

[3] After two bank cases decided by the House of Lords in 1925, the English courts in the five following years were called upon to decide (upon evidence of Russian law) whether various other types of pre-revolution Russian corporations had on various

from the legal point of view—between the decisions of the English courts with regard to the effect of Soviet legislation in relation to Russian corporations given (*a*) between 1925 and 1930, and (*b*) from 1931 onwards, because the effect of Soviet law was, for the English court, a question of fact to be proved by evidence in each case: the court had to decide in each case on the evidence before it,[1] and the general tenor of the evidence of the experts in Soviet Russian law was quite different in period (*b*) from what it had been in period (*a*). Before the House of Lords in 1925 the question was whether a bank had ceased to exist in 1920; before the courts in 1931 the issue was whether another bank had ceased to exist before 1930. There were further Soviet decrees before the courts in 1931 which were never referred to in the evidence in the earlier cases.

The second point which emerges from this series of cases is that if a foreign company is extinguished by the law of the country in which it was incorporated, it ceases to exist as a juristic person everywhere, even if it has branches in the United Kingdom which purport to be carrying on business. No actions can be brought by or against the company.[2] In the earlier cases all the members of the Court of Appeal had expressed the same view in 1923, but in 1925 when these cases came to the House of Lords, Lords Finlay and Wrenbury expressed (*obiter*) a different view with regard to the position where there were branches in the United Kingdom.[3] These dicta were relied upon in those recent cases where the banks in question had branches in the United Kingdom (see Cases Nos. 2 and 4 below), but the view expressed in them has not prevailed.

---

dates been extinguished as juristic persons by Soviet decrees. The decrees applicable to the different classes of companies were different, but the conclusion reached was in substance the same in all these cases, viz. that the companies had been put into liquidation, their property in Russia had been confiscated or placed in the hands of a Government liquidator, they had ceased to be able in Russia to trade, &c., but they had not ceased to be juristic persons. See

(1) *The Employers' Liability Corporation Ltd.* v. *Sedgwick, Collins & Co.*, [1927] A.C. 95 (*B.Y.B.* 1927, p. 199). (Russian decrees with reference to insurance companies—like the recent *Lazard Bros.* case a garnishee case—but the Russian Insurance Company had had an office and was being wound up in this country.)
(2) *The Jupiter No. 3*, [1927] P. 122 & 250 (*B.Y.B.* 1928, pp. 168 & 176). (Russian decrees with reference to shipping companies.)
(3) *The First Russian Insurance Co.* v. *London & Lancashire Insurance Co.*, [1928] Ch. 922 (*B.Y.B.* 1929, pp. 246 & 253.) (Russian decrees relating to insurance companies—the Russian companies were being wound up in the United Kingdom.)
(4) *The Manufacturing Co. I. A. Wormin Luetchg and Cheshire Ltd.* v. *F. Huth & Co.*, May 2, 1928 (*B.Y.B.* 1930, pp. 230 & 235). (Russian decrees relating to trading companies.)

[1] See *per* Lord Wright in the House of Lords in the *Lazard* case (No. 1): "What the Russian Soviet law is in that respect is a question of fact, of which the English court cannot take judicial cognizance even though the foreign law has already been proved before it in another case. The court must act upon the evidence before it in the actual case. . . . No earlier decision of the court can relieve the judge of the duty of deciding the question on the actual evidence given in the particular case. On what evidence of the foreign law a court can act has been often discussed. The evidence, it is clear, must be that of qualified experts in the foreign law. . . . The court is not entitled to construe a foreign code itself."

[2] See *per* Lord Wright in the same case: "English courts have long since recognized as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. Such recognition is said to be by the comity of nations. . . . But as creation depends on the act of the foreign state which created them, the annulment of the act of creation by the same person will involve the dissolution and non-existence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will recognize equally the one as the other fact . . . it is not easy to see how a non-existent person (since if a corporation exists at all it must be by the law of the country of its incorporation) can have anywhere a branch or assets or shareholders".

[3] These views are summarized in the digest of Case No. 2 below.

A third point which has been decided is that in the case of those dissolved companies which did at one time carry on business in Great Britain ("carry on business" in this connexion means practically "possess a branch") and which have now, by reason of their dissolution, necessarily ceased to be able to carry on business legally, there is jurisdiction in the English courts to make an order under which the branches in this country are wound up by a liquidator, and the Law Reports show that such orders have already been made on creditors' petitions in the case of at least three such dissolved companies.

There is jurisdiction to wind up a foreign company carrying on business in Great Britain whether or not it has been dissolved in its country of origin, but the position appears to be somewhat different in the two cases. Where the company has already been dissolved, the winding up is rather like the administration of the local assets of a deceased person who has died elsewhere. Where the foreign company has not been dissolved, the winding up in the United Kingdom would not appear to affect the continued existence of the foreign company, but to be rather in the nature of a bankruptcy of an individual. Orders for the winding up of some of these Russian corporations had already been made some years ago when it was thought that they had not been dissolved by Soviet law.

The making of a winding up order terminates the anomalous position of a non-existent corporation professing to continue and carry on business through a branch in this country, but it can only be made where there has been a branch in this country (the bank in Case No. 1 had never had a branch here), and in any case the order leaves a number of other questions to be decided in the liquidation. To whom, for instance, do the assets in this country of the branch of the dissolved foreign corporation belong? Scrutton L.J. in the *Lazard* case (Case No. 1 below) threw out the suggestion that such assets were *bona vacantia* and might be claimed by the Crown, and the Crown has now claimed all the assets as *bona vacantia* (see Cases 3, 4, and 5 below). If the Crown's claim is right in principle, does it extend only to the residue after all debts have been discharged, or does it oust the claim of the creditors. Perhaps there may be a distinction between debts contracted legally before the company became dissolved and debts contracted later by the branch in this country.

Hill J. in *The Jupiter No. 3*, [1927] P. 122 (see *B.Y.B.* for 1928, pp. 168 and 179), has suggested that the property of the dissolved Russian companies situated outside the territorial limits of the Soviet rule might be *bona vacantia* in the sense that it could be acquired by the first person to take possession of it.

On the other hand, can it be contended that the U.S.S.R., whose law is recognized as having the effect of dissolving the companies even in the United Kingdom, can claim the residue of the assets of the branches in the United Kingdom, seeing that the same law transferred the assets of these companies to the Soviet Government? It appears that the Soviet Government did in 1924 by letter make claim to a balance standing to the credit of a Russian bank in an English bank, but the latter then refused to admit the claim. Maugham J. (Case No. 4 below) stated that, if the Soviet Government made such a claim in the winding up, the question could be decided. In nearly all the earlier Russian cases (see footnotes nos. 2 and 3, p. 183 above), the English courts have stated that they will recognize the effect of the Soviet nationalization legislation as affecting only property situated within the territory of the Soviet Government and will not recognize it as affecting the title to property situated elsewhere, and it may well be that this principle would be held to defeat such a claim by the Soviet Government if it were made in the winding up, but it must be noticed that none of these statements was made with regard to the particular case of the assets of a dissolved Russian company, because they were all made in cases where the courts held that the companies had not been dissolved.

Before leaving the Russian Bank cases, a useful statement in the judgment of the House of Lords in the *Lazard* case (Case No. 1) of a general principle of international law deserves notice. Lord Wright was referring to a rule with regard to the service of documents abroad which had been applied to Russia before the War and whose application to that country had never been revoked. He held that the rule still applied, notwithstanding the change of régime in Russia, and he based his reasoning on an international principle of general application: "This internal change in the system of government, when once the new government is recognized by this country, has no effect on the external status of Russia *quoad* this country as a personality in international law. The identity of the state remains the same for international purposes; the change from monarchy to republic does not, in general, abrogate treaties or conventions any more than loss of or increase of territory."

Case No. 1. Lazard Bros. v. *Midland Bank Ltd.*, [1932] 1 K.B. 617 (C.A.); 49 T.L.R. 94 (H. of Lords).

L. Bros. had a claim against the Moscow Industrial Bank (hereinafter referred to as the M.I.B.), a corporation created under the law of Imperial Russia which had never had any branch or office in the United Kingdom. In October 1930 they obtained leave from Branson J. to serve notice of a writ against the M.I.B. by sending the notice by registered post addressed to the M.I.B. at Moscow. The order of Branson J. was made under Order IX, Rule 2 (substituted service in cases where it is impossible to effect personal service), and on the strength of an affidavit sworn by a partner in L. Bros., stating that the M.I.B. was a company registered and domiciled in Russia and had no address in the United Kingdom where service could be effected; that there was no means of effecting personal service in Russia; and that the directors and managers of the M.I.B. had been deprived of their powers by a decree of the Soviet Government. After an affidavit had been sworn that service had been effected in this manner, judgment was entered by default against the M.I.B. in November 1930 for the amount of the debt claimed. Three days later a letter was received from the London Embassy of the Soviet Republic, stating that the registered letter containing the notice of the writ could not be delivered to the M.I.B. because it had ceased to exist since the 1917 revolution.

Certain sums were standing to the credit of the M.I.B. with the Midland Bank, London, and L. Bros. obtained a garnishee order *nisi*, attaching these balances for the discharge of their judgment against the M.I.B. The Midland Bank appeared and sought the discharge of the order *nisi* on the grounds (*inter alia*) (1) that the M.I.B. had before the proceedings in 1930 ceased to exist as a juristic person as the result of decrees of the Soviet Government, and that consequently the judgment obtained against it, being a judgment against a non-existent person, was a nullity and could not support a garnishee order; (2) alternatively, that in any case the notice of the writ should have been served under Order XI, Rule 8 (Request to the judicial authorities of the foreign country to effect service), which rule had been applied to Soviet Russia and was by its terms the only method of service permissible in the cases where it applied, and that consequently the judgment against the M.I.B., having been obtained by default upon an invalid service of the writ, was invalid.

This issue was tried by Roche J., before whom a number of Russian lawyers gave evidence with regard to the effect of the Soviet decrees.

The effect of the evidence on Russian law appears shortly to have been as follows:

(*a*) on December 14, 1917, there was a decree of the Executive Committee of Soviets declaring the nationalization of all existing banks in Russia and the transfer of their assets and liabilities to one institution, the State Bank.

(*b*) On January 26, 1918, there was a decree confiscating the share capital of all joint stock banks and declaring all shares null and void.

(*c*) On January 19, 1920, the State Bank was abolished and all its assets and liabilities were transferred to the Central Budget and Accounts Administration, a department of the Government.

(*d*)[1] On August 3, 1921, there was issued a circular by the Central Budget Accountancy Board, stating that the transfer of the assets of the late banks to itself was now complete.

(*e*)[1] In October 1923 the Russian Civil Code of October 1922 came into force, which provided that juristic persons must have statutes registered with the proper governmental authority, that their legal capacity begins from the moment of registration, and that interpretation of provisions of this code on the basis of the laws of previous régimes or the practice of its courts was forbidden (i.e. the M.I.B. was not registered under this code and its Czarist statutes would not be recognized).

All the experts in Russian law agreed that no Soviet court would have recognized the existence of the M.I.B. as a juristic person after 1924 at the latest.

Roche J. *held*:

(1) that the effect of the Soviet decrees was to put the Russian Banks into liquidation, but not to extinguish them as juristic persons;

(2) that, though the procedure under Order XI, Rule 8, was the proper method of service, the method adopted under Order IX, Rule 2, had achieved the same result, and consequently the judgment was not invalid on this ground.

He made the garnishee order absolute.

The Midland Bank appealed to the Court of Appeal.

Held by the Court of Appeal:

(1) (On the evidence of Russian law before it) that the M.I.B. had, by reason of the decrees of the Soviet Government, ceased to exist as a juristic person in that country before 1930;

(2) that a company which had ceased to exist as a juristic person in the country in which it was incorporated had no existence in this country;

(3) that consequently, the judgment obtained by L. Bros. against the M.I.B.was null and void and could not support a garnishee order: if it came to the knowledge of the court that it had entered judgment against a company which no longer existed, the court was bound of its own motion to set the judgment aside;

(4) that in cases where a writ had to be served out of the jurisdiction in a country (e.g. Russia) to which Order XI, Rule 8, of the Rules of the Supreme Court applied, that rule laid down the procedure which must be followed (request through the diplomatic channel for service by the judicial authorities of the foreign country) and it was not possible to make an order for substituted service under Order IX, Rule 2; and that in any case the order of Branson J. for substituted service had been made on an affidavit setting out incorrect facts; that consequently the judgment against the M.I.B., having been obtained by a method of service which could not be supported, was not one which could properly be made the basis of a garnishee order even if it were not void on the ground stated in (3) above.

(5) For these reasons the judgment of Roche J. must be set aside.

On appeal to the House of Lords, the House, in a judgment delivered by Lord Wright and unanimously concurred in by the other Law Lords, affirmed the decision of the Court of Appeal on the same grounds as those stated above.

Case No. 2. Russian and English Bank v. *Baring Bros.*, [1932] 1 Ch. 435. (Eve J.).

The plaintiff Bank was a company incorporated in 1911 under the laws of Imperial Russia. The majority of the shares were held by British subjects, and in 1915 it established a branch in London with a separate management there.

---

[1] No evidence on these points was before the House of Lords in 1925 (see footnote no. 2, p. 183 above).

During the War the Imperial Russian Government kept an account with the Defendants, bankers of London, known as the *Compte spéciale*, into which moneys were paid to the credit of the Government by the Bank of England against the deposit with the Bank of England of Russian treasury bills payable to the order of the Treasury of the United Kingdom and discounted by the Bank. In October 1917 (just before the second Bolshevik Revolution) the then Russian Ministry of Agriculture, having made an appropriation for the purchase of seeds from a Danish firm, cabled instructions to the Defendants to pay the sum of £180,000 out of the *Compte spéciale* to the London branch of the plaintiff bank. The Defendants refused to make the payment on the ground that before they could do so they required the authority of the agent in London of the Russian Treasury.

In November 1917 the Bolshevik revolution took place in Russia and the plaintiff bank ceased to carry on any business there, and various Soviet decrees were passed under which Russian banks were liquidated and nationalized (see Case No. 1 above). The branch in London of the plaintiff bank purported to continue to carry on business, and in 1921 began an action against the Defendants, claiming a declaration that they were the assignees of the sum of £180,000 standing to the credit of the Imperial Russian Government in the *Compte spéciale*, claiming payment of this sum with interest and, if necessary, administration of the *Compte spéciale*. Pleadings were delivered, but the action lay dormant till 1929 when the pleadings were amended and the Attorney-General was added as a Defendant.

The Attorney-General contended that the approval of the Treasury of the United Kingdom was required for all payments out of the *Compte spéciale*, and the Treasury did not approve these payments; he claimed on behalf of the Crown all rights and interests in the *Compte spéciale*. The Defendants did not admit that there had been an assignment to the Plaintiffs of the sum claimed; they stated that the credits in the *Compte spéciale* were insufficient to meet the claims of the Plaintiffs and other claimants and that they made no claim themselves to the amounts standing to the credit of this account and merely desired to assist the court in determining who was entitled thereto. In June 1931, however, the Defendants took out a summons, asking that the proceedings should be stayed on the ground that since the action was commenced in 1921 the plaintiff Bank had ceased to exist as a juristic person by reason of the decrees of the Soviet Government in Russia. The decision of the Court of Appeal in the *Lazard* case (Case No. 1) had been given before judgment was given on this summons.

It was contended on behalf of the plaintiff Bank that, though the plaintiff Bank had been extinguished as a corporate person in Russia, the branch in London, with English shareholders, continued to exist and the Soviet legislation had no extra-territorial effect and therefore did not affect the existence of the branch in London. The Plaintiffs relied upon (*a*) the dictum of Lord Finlay in the *Mulhouse* case ([1925] A.C. at p. 141) to the effect that, even if the foreign corporation had been extinguished by the law of the country of incorporation, nevertheless the branch in this country must have the right to collect assets and to sue in the corporation's name for this purpose;

(*b*) the dictum of Lord Wrenbury in the same case (p. 149) that the position in the United Kingdom of a foreign corporation carrying on business here is that of an unregistered company, i.e. a partnership of natural persons whose relations *inter se* are governed by the constitution of the company, which is not terminated by the death of the foreign corporation but may be wound up here like an unregistered company;[1]

(*c*) the power given to the English courts under Section 338 (2) of the Companies Act 1929 to wind up as an unregistered company a foreign corporation carrying on business in Great Britain, *notwithstanding that it has ceased to exist under the law of the country of incorporation*, as evidence that the extinction of the foreign company under the law of the country where it was incorporated was not deemed to extinguish the company in England if it had a branch there;

---

[1] All the members of the Court of Appeal had expressed a contrary view in the *Mulhouse* case, [1923] 2 K.B. at pp. 688, 691, 693.

(*d*) the fact that the plaintiff Bank had a branch in England and the M.I.B. had not, as distinguishing this case from the decision of the Court of Appeal in the *Lazard* case (No. 1 above).

Held by Eve J.:

(1) that the plaintiff Bank had ceased before June 1931, but possibly after 1921, to exist as a juristic person under the law of the country of its incorporation;

(2) that the termination of the existence of the plaintiff Bank under the law of its country of incorporation caused its existence to terminate in the United Kingdom, although it had a branch there;

(3) that consequently, this action could not be maintained in the name of the plaintiff Bank, and must be stayed.

Case No. 3. In re Russian and English Bank, [1932] 1 Ch. 663, 48 T.L.R. 282 (Bennett J.).

This was a petition presented by creditors for the compulsory winding up of the Russian and English Bank under Section 338 of the Companies Act 1929. The Bank was the same as that which was the Plaintiff in *Barings* case (see Case No. 2 above), and the petition was brought in pursuance of certain observations made by Eve J. in that case. It was admitted in these proceedings that the bank had ceased to exist as a juristic person before the coming into force of the Companies Act 1929.

The petitioners had commenced an action in 1927 in the English courts against the bank to recover a debt of £20,000 which they alleged to be due to them. Owing to the dissolution of the company they were unable to proceed with their action, but the debt which they claimed was disputed. The question was raised whether the court had in the circumstances of the case power to make an order for a compulsory winding up of the bank. The petition was opposed by other creditors of the bank, not on the ground that there was no jurisdiction, but on the ground that the petitioners, having a disputed debt, were not entitled to present a petition, and that these other creditors, having an admitted debt, had presented a petition on which the order should be made.

The Attorney-General appeared and argued on behalf of the Crown that (1) the bank being a non-existent person, the Crown had a claim to its assets as *bona vacantia*, and (2) the court had no power to accede to the present petition on the ground that the words of Section 338 (2), "where a company incorporated outside Great Britain *ceases* to carry on business in Great Britain, it may be wound up as an unregistered company under this part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated", showed that the jurisdiction given to wind up foreign companies only applied where the company had ceased to carry on business in the United Kingdom after the coming into force of the Act. It did not apply where the foreign company had been dissolved and therefore ceased to be able to carry on business in Great Britain before the Act came into force.

Sub-section (2) of Section 338 was new; it did not appear in the corresponding section of the Companies Act 1908, though sub-section (1) (which laid down the conditions under which an unregistered company might be wound up and included cases where "the company is dissolved or has ceased to carry on business . . .") was a verbatim reproduction of a corresponding section of the earlier Act.

Held:

(1) that there was jurisdiction to wind up this bank under Section 338, although it had been dissolved before 1929. It had already been held under the section of the

earlier Act corresponding to section 338 (1) that a foreign company which had been dissolved in the country of its incorporation could be wound up in this country as an unregistered company; the new sub-section (2) was not intended to limit the power existing under sub-section (1) as previously interpreted, but only to make it clear that it extended to foreign companies which, though not technically dissolved, had otherwise *ceased to exist* in their country of origin (i.e. the position in which Russian companies were thought to be after the decisions of the House of Lords in 1925);

(2) that though in general a disputed debt may not be the basis of a creditors' petition for a winding up order, that rule could not without injustice be applied to the present case, where the petitioning creditors could not continue the action which they had begun to settle the dispute as to their debt, and should not accordingly be held to apply. The making of the order on their petition in no way established the validity of their claim which the liquidator would be free to reject;

(3) that a winding up order should be made on the petition accordingly.

Two further winding up orders have been made in England upon the petition of creditors in respect of Russian corporations under Section 338 of the Companies Act, on the ground that these corporations had, by reason of Soviet legislation, ceased to exist as juristic persons and, therefore, must have ceased to carry on business in Great Britain. Both these orders were made by Maugham J. and in both cases the Russian corporations had had branches in England. The former of these cases was another bank, but the latter, it is interesting to note, was an ordinary trading company.

Case No. 4. In re Russian Bank for Foreign Trade, 1933, W.N. 67, 49 T.L.R. 253.

In this case the petition was served upon the persons whose names had been registered by the bank under the Companies Act as authorized to accept service on its behalf, and these persons were represented at the hearing of the petition and opposed the order on the grounds (1) that the bank could not have ceased to exist so long as it had, as it claimed to have in London and Paris, branches with which the Soviet Government had not dealt or which it had not taken over;

(2) that the debt on which the petitioning creditor based his petition was disputed and was in any case locally situated in Russia and was, therefore, affected by the Soviet decrees transferring to the Soviet Government the assets of the banks in Russia and extinguishing debts due by the banks.

Held by Maugham J.:

(1) under Section 338 there was jurisdiction in the English courts to wind up a foreign company which had a branch in Great Britain if it had ceased legally to carry on business in Great Britain, whether or not it had been dissolved as a company under the law of the country in which it was incorporated;

(2) (upon evidence of Russian law) that the bank had ceased to exist as a corporation by reason of Soviet legislation, or *alternatively*, even if it had not been so dissolved, none of the provisions of its statutes could be complied with and it was impossible for it to carry on business in accordance with them; the managers and employees of the branch in London could not be held to be carrying on business as agents for the Soviet Government, to whom the assets of the former Russian banks had been transferred, since in all the fifteen years which had elapsed since the Soviet nationalization decrees, the Soviet Government had made no provision by decree regulating the position of the branches abroad and had held no communication with the managers of such branches;

(3) for either of the alternative reasons in (2) above, the branch in England of this bank could not legally carry on business in Great Britain, and therefore there was jurisdiction to wind it up, and it should be wound up;

(4) if the petitioning creditor's debt was locally situated in Russia, it was affected by the Soviet legislation and could not be recovered in the winding up here; if it

was locally situated in the United Kingdom, it was not affected by that legislation even if due to a person who was a Russian subject at the time of the nationalization decrees. This question could be decided in the winding up, as also the question whether the Soviet Government (if it wished to make a claim) had a claim to the residue of the assets, or whether the Crown could claim the residue or the whole of the assets as *bona vacantia.*

Case No. 5. In re Tea Trading Co., K. & C. Popoff, [1933] W.N. 79.

In this case, that of a trading company, the winding up order was also made under Section 338 of the Companies Act after evidence of Russian law that the existence of the company had been terminated by Soviet legislation, but a further question arose, namely, how the winding up petition should be served. Rule 28 of the Companies (Winding up) Rules 1929 requires the petition to be served on the *company* at its registered office, if any (and if not at the last known principal place of business of the company), by leaving a copy with an officer, &c. of the company there, or if there is no such officer, &c. there, by leaving the copy at such registered office or place of business. In this case the name of X. (the manager of the London branch of the company and the husband of the petitioning creditor) had been filed under the Companies Act as that of the person authorized to accept service on behalf of the company, but X. had died in 1922. The Registrar had made an order for substituted service by public advertisement.

Maugham J. held that, since Section 338 of the Companies Act clearly contemplated the winding up of companies which had ceased to exist, and the rules therefore must contemplate some sort of service on the extinguished company, the service contemplated by the rules was service on some office or person within the jurisdiction. If X. had been alive, service might have been effected upon him, but since he was dead it was possible to comply with the rule by leaving the copy of the petition at the last principal place of business of the company in London, which was known in this case. The order of the Registrar for service by advertisement had been made in error under a rule (Order 67, Rule 6, of the Rules of the Supreme Court) which only applied where there was a *person* who could be personally served but for some practical reason it was difficult to do so promptly; here, the company being defunct, there could be no personal service on it.

The case of *Croft* v. *Dunphy* (Case No. 6) is a decision of the Privy Council on the legislative powers of Canada under the British North America Act. Strictly speaking, no question of international law could arise in the case, because the legislative provision which was the subject of the decision was one which in terms only applied to Canadian vessels, and it was a Canadian vessel which was involved. The point decided is in any case one which cannot arise with regard to Canadian legislation in the future on account of the provisions of Section 3 of the Statute of Westminster, 1931. The case would not have been included here if it had not been that the judgment of the Privy Council contains certain *dicta* upon questions of international law, which are likely to give rise to a good deal of discussion. It is unnecessary to discuss them in this note as they form the subject of notes by other writers in this number of the *Year Book.*[1]

Case No. 6. Croft v. *Dunphy,* [1933] A.C. 156. 48 T.L.R. 652 (P.C.).

The Respondent's schooner, which was registered in Canada where the Respondent resided, sailed from the French island of St. Pierre with a cargo of liquors dutiable under Canadian law. The vessel was, when 11½ miles from the coast of Nova Scotia, boarded by the Appellant, a Canadian customs officer, and the vessel and cargo were seized and taken into port. The boarding and seizure were effected under Sections

---

[1] See pp. 149 and 155.

151(1) and 207(1) of the Customs Act of Canada 1927, which authorize the boarding of a vessel "hovering" in the territorial waters of Canada and the seizure of the vessel and cargo if dutiable goods are found on board. It was not disputed that the vessel was so "hovering". The territorial waters of Canada are defined for the purposes of the Act by Section 151(7) as being "waters forming part of the territory of Canada and the waters adjacent to the Dominion within 3 miles thereof in the case of any vessel, and within 12 miles in the case of any vessel registered in Canada.

The validity of the seizure was disputed on the ground that it was not within the powers of the Parliament of Canada under Section 91 of the British North America Act 1867 (which gives power to legislate for the peace, order, and good government of Canada) to pass legislation operating to a distance of 12 miles from the coast of Canada, and the Supreme Court of Canada so held, by a majority of 3 to 2, reversing a contrary unanimous decision of 5 judges of the Supreme Court of the Province of Nova Scotia. The Appellant appealed to the Privy Council.

The Privy Council allowed the appeal on the following grounds:

(1) "It may be accepted as a general principle that states can legislate effectively only for their own territories. To what distance seaward their territories are to be deemed to extend is a question of international law upon which Their Lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory."

(2) Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order, and good government of Canada (and it is not disputed that customs law for Canada is such a topic), there is no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign state.

(3) The contention that the British North America Act did not confer power on the Dominion Parliament to legislate contrary to the principles of international law would not (even if it were right) afford any ground for holding the provisions of Section 151(7) of the Canadian Customs Act to be invalid, because (*a*) no question of international law is involved, seeing that the provision impugned has no application to foreign vessels; and (*b*) legislation of the kind is recognized as legitimate by international law.

(4) In considering what is the scope of a power to legislate on a particular topic, it is important to have regard to what is ordinarily embraced in that topic in the legislative practice of the state which conferred the power. The customs legislation of the Imperial Parliament has from early times contained anti-smuggling provisions authorizing the seizure of vessels having dutiable goods on board when found "hovering" off the coast within distances substantially in excess of ordinary territorial limits. Though all these provisions are now repealed, the Customs Consolidation Act 1879, Section 179, authorizes the seizure of any ship belonging wholly or in part to British subjects, or having half the persons on board British subjects, if found with prohibited goods within 3 leagues of the coast of the United Kingdom. In the case of other vessels not British, the limit is fixed at 1 league from the coast. Since legislation of the United Kingdom had, at the time when the British North America Act was passed, executive provisions to take effect outside ordinary territorial limits, enacted to render anti-smuggling legislation effective, there is no reason to suppose that the Imperial Parliament, when bestowing on the Canadian Parliament plenary power to legislate in relation to customs, intended to withhold from it the power to enact measures similar to those which formed part of the customs legislation of the United Kingdom.

In the case of *Assicurazioni Generali* v. *Selim Cotron* (Case No. 7), the decision turned on the interpretation of the provisions of the Treaty of Peace between the Allied Powers and Turkey, signed at Lausanne, relating to life assurance contracts (paragraph 2 of Annex No. 1 of Section 2 (Contracts and Prescriptions) of Part III (Economic Clauses)). The case came before the Privy Council on appeal from Palestine, the provisions of this part of the treaty having been made by Ordinance part of the municipal law of Palestine. It was held that the treaty provisions in question applied to a contract of life assurance between a Turkish national domiciled in Palestine and a company carrying on business at Trieste, which was of Austro-Hungarian nationality throughout the War and became an Italian company when Trieste was ceded to Italy under the Treaty of St. Germain (July 1920).

The next two cases are shipping cases. The first (Case No. 8) raises questions relating to one of the Brussels Maritime Law Conventions. Further comment is best reserved till after the digest.

Case No. 8. The Torni, [1932] P. 27 and 78, 48 T.L.R. 195 and 471 (Langton J. and Court of Appeal).

The International Convention for the unification of certain rules relating to Bills of Lading, which was signed at Brussels in August 1924 as one of the results of the Maritime Law Conferences held in 1922 and 1923, was accepted by the United Kingdom and extended to Palestine. In order to give effect to the Convention, the Carriage of Goods by Sea Act, 1924, was passed in the United Kingdom, and Ordinance No. 43 of 1926 was made in Palestine. The Palestine Ordinance made the rules of the Convention (generally referred to as the "Hague Rules") applicable in connexion with the carriage of goods by sea in ships from any port in Palestine to any other port whether in or outside Palestine, and further provided in Section 4 that every bill of lading issued in Palestine which contained or was evidence of any contract to which the rules had been made applicable should contain an express statement that it was to have effect subject to the said rules and should be deemed to have effect subject thereto, notwithstanding the omission of such express statement.

Various consignments of oranges were shipped from Jaffa in Palestine to fruit merchants in Hull in the United Kingdom by Palestinian merchants in the s.s. *Torni*, an Estonian vessel (then under time charter to S. R. & Co., shipbrokers of Swansea, as part of a shipping service organized by them between the United Kingdom and Palestine) under bills of lading issued in Palestine by the J. U. L. Ltd., a Palestinian company, as agent for S. R. & Co. These bills of lading did not contain the express statement with regard to the Hague Rules as required by Section 4 of Ordinance No. 43, but contained a clause (No. 14) stating "This bill of lading wherever signed is to be construed according to English law".

The Plaintiffs, as owners and consignees of the oranges, brought proceedings in the English courts against the owners of the s.s. *Torni* in respect of damage and/or short delivery. Two of the Plaintiffs were indorsees of the bills of lading and sued thereon: the remainder had merely presented the bills and paid the freight, and sued on an implied contract with the defendant shipowners to deliver the oranges in good order and condition according to the terms of the bills of lading.

The Defendants relied upon certain exceptions in the bills of lading as exempting them from liability. The Plaintiffs contended that these contracts of carriage were subject to the Hague Rules and that by reason of the Hague Rules these exceptions in the bills of lading were of no avail, and the question whether these contracts were subject to the Hague Rules was set down for trial as a preliminary question of law. The United Kingdom Carriage of Goods by Sea Act 1924 only applied (like the Palestine Ordinance) to outward shipments, and therefore the issue for decision was whether the English court must hold that the Hague Rules applied by reason of the operation of the Palestine Ordinance.

Held by Langton J.:

(1) that, although His Majesty was Mandatory for Palestine and the Palestine Ordinance No. 43 was enacted by the High Commissioner under powers conferred on him by His Majesty in Council by the Palestine Order-in-Council 1922, made under powers conferred by a United Kingdom Act of Parliament (the Foreign Jurisdistion Act, 1890), and although the Ordinance was an adaptation for Palestine of the United Kingdom Act of 1924 and had been enacted for the same purpose as the United Kingdom Act, an English court must consider the application of this Ordinance to these contracts in the same manner and according to the same principles as the application of a similar law of any foreign country in analogous circumstances;

(2) that, the general principle, adopted by the English courts in the choice of the law to be applied to determine the rights of the parties to a contract, was that the contract should be construed in accordance with the law which the parties intended at the time when the contract was made;

(3) that, in spite of the fact that the consignees were merchants in the United Kingdom and delivery was to take place there, and in spite of the express clause in the bills of lading that they were to be construed according to English law, it should not be taken to have been the intention of these parties to exclude the operation of the Palestine Ordinance, seeing that Palestine was the *locus contractus*, the goods were shipped there and the shippers were Palestine merchants;

(4) alternatively to (3), even if by Clause 14 of the bills of lading the parties did intend to contract out of the Palestine Ordinance, the English courts would not enforce such a provision. Palestinian law was the *lex loci contractus* and the Ordinance applied to these contracts by its own terms; the provisions of Section 4 of the Ordinance were clearly framed so as to prohibit any contracting out of the Hague Rules in cases where the Ordinance applied; and though an English court might not refuse to enforce a provision of a contract *merely* because it would have been held to have been void by the *lex loci contractus*,[1] an English court would refuse to enforce a provision which was *illegal* or prohibited by the *lex loci contractus*;

(5) that consequently the Hague Rules must be held applicable to the contract contained in the bills of lading by reason of the operation of the Palestine Ordinance, and the shipowners were precluded from relying upon the exceptions in the bills of lading as against the Plaintiffs who were indorsees of the bills;

(6) that the other Plaintiffs, though they were not parties to the contract embodied in the bills of lading and merely sued on an implied contract created by the presentation of the bills and the payment of the freight (both acts done in England), had the right to contend that the terms of the implied contract so created were *prima facie* the same as those of the original contract entered into by the shippers, and the onus to prove circumstances altering those terms was on the shipowners and that onus of proof had not been discharged.

On appeal, *held* by the Court of Appeal:

(1) that the provisions of Section 4 of the Palestine Ordinance made it imperative to insert in bills of lading, to which the Ordinance applied, a provision to the effect that they were subject to the Hague Rules, and made it illegal to issue bills without this provision, but, in order to prevent bills thus illegally issued from resulting in the nullity of the entire contract of carriage, the Ordinance provided that such bills should have effect subject to the rules;

(2) that consequently, if Clause 14 of the bills of lading was to be read as a

---

[1] i.e. where the contract is to be performed in whole or in part elsewhere and the *lex loci contractus* is not the law by which the contract is to be construed.

provision embodying the intention of the parties to contract out of an imperative provision of the *lex loci contractus* and to produce a result which was illegal by that law, it was a provision to which the English courts must for reasons of comity refuse to give effect;

(3) that Clause 14 need not and therefore should not be construed as expressing any such illegal intention; it was possible to give full effect to Clause 14 by interpreting it as meaning that the bills of lading, together with all the rules (if any) which the *lex loci contractus* required to be read into them, should be construed according to English law;

(4) that for the above reasons the decision of Langton J. in so far as it dealt with the two Plaintiffs who were indorsees of the bills of lading should be affirmed. His decision as regards the other Plaintiffs (see point (6) above) should be set aside on the ground that there was not before him sufficient evidence of the circumstances in which these persons received the goods to enable him to decide the question so far as they were concerned.

Only two comments on this case need be made. The first is that, if the court had taken a different view, it would have been possible, as Scrutton L.J. said, for shipowners to defeat the whole object of the Brussels Convention by inserting in their contracts a clause to the effect that the contract should be construed, not according to the law of the country where the contract was made, but according to the law of the country to which the ship was going, although both countries were parties to the Convention—an absurd and regrettable result. The second is that the case shows another instance of the modern tendency of the English courts to enlarge the conception of their obligations under the comity of nations to respect foreign laws, and to narrow the scope of earlier precedents where, in contract cases, the laws of foreign countries, in which contracts were made or to be performed, had often been in effect ignored by a very wide application of the principle of interpreting the contract according to that law which the parties intended to be applied.[1]

The second shipping case (Case No. 9) illustrates the application by the English courts of two principles: (*a*) the recognition and enforcement of a right of security duly acquired under a foreign law; (*b*) that questions of priority are decided in accordance with the *lex fori*.

Sometimes (as in this case) it is difficult to determine under which of these two principles a given point falls to be decided.

Case No. 9. The Zigurds, [1932] P. 11; 48 T.L.R. 556 (Langton J.).

A Latvian steamship Z. had incurred various liabilities to creditors in the United Kingdom and in Germany. Proceedings were brought *in rem* in the English courts both against the ship and the cargo in respect of the freight, and the ship was sold and the freight paid into court by the cargo owners. The sum realized by the sale of the ship and the freight was insufficient to meet the claims, and questions of priorities arose.

The claims were those of (*a*) A. & Co. for the supply of necessaries at West Hartlepool in March 1931. A. & Co. claimed as "necessaries men" and as equitable assignees of the freight. (*b*) B., a mortgagee of the vessel who also alleged a legal assignment to him of the freight. (*c*) K. & Co., who had supplied necessaries (bunker coal) to the vessel in a German port in September 1930. K. & Co. claimed that under German law the supply of these necessaries had taken place under a form of contract which conferred on the sellers the status of "ship's creditors" and created rights equivalent to that of a maritime lien, and therefore, by reason of these rights acquired under German law, their claim had precedence over that of the mortgagee B. and that of the English necessaries men A. & Co.

---

[1] Cp. *Foster* v. *Driscoll*, [1929] 1 K.B. 470: *B.Y.B.* 1930, pp. 227 and 231; *Ralli Bros.* v. *Companià Naviera Esta y Aznar*, [1920] 2 K.B. 287; and contrast *In re Missouri Steamship Co.*, [1889] 42 Ch. 321; *Dobell & Co.* v. *Steamship Rossmore Co.*, [1895] 2 Q.B. 408.

The consistent refusal of the English courts to accede to arguments suggesting that, on grounds of public policy and the like, they should *not* recognize the effect of the laws of the U.S.S.R. or the acts of the Soviet Government in its own territory, is an illustration of the same tendency (*vide Princess Paley Olga* v. *Weitz*, [1929] 1 K.B. 718, *B.Y.B.* 1930, pp. 228 and 233).

Held with regard to the claim of K. & Co. to priority:

(1) (upon evidence of German law) that the German Code, in creating the special rights of a "ship's creditor", only intended to create rights *inter se* of creditors in Germany, which come into operation only in the German courts if the vessel and freight is arrested in Germany.

(2) that in any case the English courts would only have to have recourse to German law to ascertain the nature of the right acquired in Germany in order to decide into which of the English classes of creditors the claim of K. & Co. should fall, and not in order to ascertain the relative priorities of the different classes of creditors, which was governed by the *lex fori* (English law).

(3) that the class into which the claim of K. & Co. fell was perfectly clear (i.e. that of necessaries men) and they had not acquired under German law any rights such as a maritime lien or hypothec which operated unless the ship was arrested in Germany.

(4) Consequently, the claim of K. & Co. to rank in priority to the mortgagee and English necessaries men must be rejected.

The next three cases are decisions with regard to the question where a person is to be deemed to be domiciled—an important question in English Private International Law, since domicil is the basis both of the law to be applied in questions of personal status and of jurisdiction in matrimonial causes (exclusive in the case of divorce). The first of these three cases decides that the fact that a person is an alien (and as such subject to the restrictions on aliens in this country and liable to deportation) does not of itself prevent the acquisition by him of a domicil in this country. This decision may be compared with that given in *In re Annesley* ([1926] 1 Ch. 692, *B.Y.B.* 1927, p. 195) where it was held that a British subject might be domiciled in France although she had not taken the steps required by French law (Article 13 of the Civil Code) to acquire a domicil there. To some extent it is a converse case to the present one.

*Case No. 10. **Boldrini** v. **Boldrini**,* [1932] P. 9 (C.A.).

The Petitioner was a waiter, living in London, of Italian nationality and domicil of origin. He came to England in 1914. From 1916 to 1920 he served in the Italian army. He returned to England upon demobilization. He married the Respondent in 1923 in England. There had been some uncertainty as to where the Petitioner and his wife should live, but in July 1930 Petitioner took a tenancy of a house in London as a suitable place where they could live and let rooms.

In September 1930 Petitioner instituted proceedings against his wife in the English courts for divorce.

The Respondent contended (1) that the English courts had no jurisdiction because the Petitioner was not domiciled in England, and based this contention principally on the ground that the Petitioner, being an alien, was only living in England under a certificate of registration under the Aliens Order 1920; he could be deported at any time by the authorities and consequently could not have that determination to make England his permanent home necessary to enable him to acquire an English domicil of choice;

(2) that alternatively, even if these facts did not render it legally impossible for him to acquire an English domicil, yet, when coupled with the failure of the Petitioner to apply for a certificate of naturalization which if granted would have

released him from the restrictions resting on an alien, they were factors to be taken into account and went to show that the Petitioner had not discharged the onus upon him to prove an English domicil of choice.

Lord Merrivale P. held that the Petitioner had discharged the onus of proving that he had acquired a domicil of choice in England, and on appeal the Court of Appeal confirmed this decision, holding that an alien might choose to live in England permanently and to submit himself to the restrictions of the Aliens Order, and the possible danger if he misbehaved himself of deportation did not prevent him acquiring a domicil of choice *animo et facto*.

Other cases with regard to domicil, which it is not necessary to digest, are (1) *Bradfield* v. *Swanton*, [1931] Ir. R. 446 (Case No. 11), a decision which brings out the independence of domicil from nationality or political allegiance. The testator was held to be domiciled in the Irish Free State although neither a British subject nor a citizen of the Irish Free State.

(2) *The Attorney-General* v. *Yule*, 145 L.T. 9 (Case No. 12), a case which illustrates the distinction between domicil and mere residence, the necessity of strong evidence to prove a change of domicil, and the little weight attached to declarations by a person that he is domiciled in a given country made in wills and the like.

(3) *Grant* v. *Grant*, 139 S.C. 238 (Case No. 13), a case where a man was held to have acquired and retained a domicil of origin in Scotland although he and his father had been born and resident in India, and his grandfather, from whom the Scottish domicil of origin was held to descend, had been resident in India in the service of the East India Company. It requires the *animus* to make a permanent home in a new country, as well as the *factum* of actual residence there, to create a new domicil of choice. The grandfather had not this *animus* and therefore retained his domicil of origin, which the father and the respondent inherited at birth and never lost because there was no such *animus* on their part. A domicil of origin may therefore descend through many generations born and resident abroad. The Scottish court held that the exceptional principle of Anglo-Indian domicil, applied to persons in the service of the old East India Company (see footnote below, *Peal* v. *Peal*)[1], was not (or no longer) a part of the law of Scotland even if it were part of the law of England. Otherwise the decision would have been different, as the grandfather was in the service of this company in India.

---

[1] In *Peal* v. *Peal* (1930), 46 T.L.R. 645 (a curious case), the wife sought a decree of restitution of conjugal rights, and the husband cross-petitioned for a decree of nullity of marriage on the ground that the parties were within the prohibited degrees of consanguinity (the wife was the daughter of the husband's paternal grandfather). The parties were Roman Catholics, and the marriage had been celebrated in India at a Roman Catholic church under a special dispensation from the Roman Catholic Church. Under the law of England neither of these parties had the capacity to marry the other (32 Hen. VIII, c. 38), and the President held on the evidence that Christian British subjects domiciled in India were, by Indian legislation, made subject to English law as regards capacity to contract marriage, whatever Christian church they belonged to. Therefore the marriage was void as being one which the parties had no capacity to contract by the law of their domicil, whether the parties were domiciled in England or in India, and a decree of nullity was made accordingly. (The capacity of Christians domiciled in India, who are *not* British subjects, to contract marriage is governed by the ecclesiastical law of the church to which they belong.) The President discussed, but did not apparently decide, whether the parties were domiciled in India or in England, either at the time of the marriage or at the time of these proceedings. The family from which both parties sprang had been resident in India for four generations, and the husband's father and grandfather, as well as himself and the wife, were all born there. The husband was in the Indian army, and his father, grandfather, and great grandfather had all been in the public service in India. But the evidence was that none of these persons had intended to make India his permanent home and all had retained the *animus* to return to England. There was no impossibility in the retention of a domicil

In the case of *Wilkins* v. *Wilkins* (48 T.L.R. 425, Case No. 14), a divorce granted by the High Court of Madras, British India, dissolving the marriage of two British subjects resident in India but domiciled in the United Kingdom, was registered in the High Court in England under the Indian and Colonial Divorce Jurisdiction Act, 1926. It was registered on the application of the Respondent, and the question was raised whether it was open to the guilty Respondent to make the application. Lord Merrivale held, however, that the application might be made by anybody with a real interest in the cause.

As is well known, the ordinary rule of English law is that only a divorce granted in the country of the domicil (not residence) is recognized in England. The Indian Divorce Act of 1869 had given the Indian courts jurisdiction to grant divorces in respect of marriages solemnized in India where the Petitioner was resident there. The English courts, however, applied their ordinary rule and refused to recognize an Indian divorce where the parties were domiciled in the United Kingdom. As the result of this decision, an Act was passed in this country validating retrospectively Indian divorces granted under the Indian Act of 1869, but making no provision with regard to future divorces, and a later Indian Act of 1926 restricted the power of the Indian courts in matters of divorce to persons domiciled in India. For practical reasons it is difficult for persons domiciled in the United Kingdom but resident in India to take proceedings for divorce in this country, and accordingly the Indian and Colonial Divorce Jurisdiction Act, 1926, was passed, giving power to the Indian courts and to the courts of any colony to which the Act was extended (it has been extended to Kenya) to grant divorces to British subjects resident there but domiciled in the United Kingdom. The power so given to Indian and colonial courts is given in such a way as to make it supplementary to that of courts of England and Scotland, seeing that the jurisdiction must be exercised upon the same principles as those followed by the High Court in England, and the divorce itself is not operative until registered in England or Scotland as the case may be.

The next case is one where the English courts refused to accept the arguments which were put forward against the recognition in this country of a French divorce. Further comment may be deferred till after the digest of the case.

---

of origin in England through successive generations born and resident elsewhere, and, if the matter fell to be decided by the ordinary principles, it would appear that the President would have held the parties to be domiciled in England, but the great grandfather had been in the service of the East India Company, and the English courts had in the past adopted an exceptional and anomalous rule under which persons in the service of this company in India had been held to acquire a domicil in India by mere residence there although the usual *animus* was absent (Anglo-Indian domicil). It would appear, therefore, that under this rule the great grandfather would be held to have acquired a domicil in India, and if this was the case, the husband's grandfather, and father, and the husband and wife would have inherited an Indian domicil from him. The special rule had since been criticized and discarded by the courts (i.e. it is not applied to persons in the service of the existing Government of India), but presumably it must be applied even now to determine what was the domicil of a deceased person in the service of the old East India Company. (N.B. Lord Sands, in the Scottish case of *Grant* v. *Grant*, see above, p. 197, took the view that there had been a definite change of legal doctrine and, though a Scottish court sitting in 1843 might have decided that X., now dead, was domiciled in India in 1843 under the Anglo-Indian domicil principle, a Scottish court, sitting to-day and only determining the domicil of X. in 1843 for the purpose of ascertaining that of Y. in 1931, should apply the legal conceptions of to-day.)

The jurisdiction of the English courts to make a decree of restitution or of nullity in this case appears from the report to be nowhere discussed, and if the matrimonial domicil was Indian it is not easy to see on what ground the jurisdiction of the court was based. There was no matrimonial residence in England; the parties were living apart, and the husband was still in the Indian army and was only temporarily in England.

Case No. 15. Vardy v. *Smith* (*otherwise Vardy*), 48 T.L.R. 661; 49 T.L.R. 36.

V., a man of Greek nationality and domicil of origin, came to England to practise his profession. He acquired an English domicil and became a British subject by naturalization. He married the Plaintiff in 1901 in London. Their matrimonial relations were unhappy, and in September 1908 the Plaintiff left the house of V. in London and filed a petition in the English courts for judicial separation. V. went to live in Paris and took steps to become a French citizen by naturalization, and in 1909, while the Plaintiff's suit in England for judicial separation was still pending, he began proceedings for divorce against her in the French courts on the ground of desertion.

The Plaintiff applied to the English courts for an injunction to restrain V. from proceeding with his divorce suit in Paris, and obtained an order from the President, but this order was, on production of further evidence, reversed by the Court of Appeal in April 1909. The Court of Appeal found that V. had acquired a domicil in France in accordance with the requirements of French law, and having obtained it was entitled to take proceedings for divorce there on grounds recognized by French law.

The Plaintiff's suit in England for a judicial separation was compromised by a deed of separation in December 1909, under which V. covenanted to withdraw his divorce proceedings in France. In October 1910 the Plaintiff again lived in V.'s house in Paris for a short time, but left him, and V. continued his divorce proceedings in Paris and obtained a decree of divorce in June 1911.

In December 1915 V. married the Defendant in London, and in 1916 he died. In December 1916 the Defendant obtained from the English court letters of administration in respect of V.'s estate as his lawful widow, and the Plaintiff by proceedings begun in 1931 sought the revocation of the grant of administration to the Defendant and a grant to herself on the ground that she was the lawful widow of V. because the French divorce of 1911 was invalid and the marriage of V. and the Defendant null and void.

The Plaintiff contended that the French divorce of 1911 was invalid on the grounds:

(*a*) that V. was not domiciled in France in 1911 and therefore the French courts had no jurisdiction;

(*b*) that it was obtained in proceedings contrary to natural justice, in that the Plaintiff did not receive due notice of the proceedings and had no knowledge of them;

(*c*) that it was obtained by fraud in that V. concealed material facts from the French courts, which if known would have prevented his obtaining a decree of divorce, viz. the separation deed of December 1909 and the resumption of cohabitation in France.

Held by Lord Merrivale P. (his decision being affirmed by the Court of Appeal):

(1) that, though the decision of the English Court of Appeal in April 1909[1] that V. had acquired a domicil in France, having been given between different parties, did not render that question *res iudicata* in this case, he had come to the same conclusion on the evidence and, therefore, the French courts had jurisdiction;

(2) That the Plaintiff had notice and knowledge of the French proceedings;

(3) That the Plaintiff had failed to prove that the facts concealed by V. from the

---

[1] The report of the decision of 1909 does not make it clear whether the Court of Appeal found that V. had acquired a domicil in France in accordance with the conceptions of French law or of English law or of both. The two conceptions are not the same.

French court would have had the effect under French law of making it incumbent upon the French court to refuse a decree of divorce;

(4) That therefore the French divorce of 1911 was one which the English courts must recognize.

Lord Merrivale expressed some doubt whether it was necessary or proper for him to enter into an examination of points (2) and (3) at all. He said: "Probably the true view is that in such a case when domicil is established a foreign court is bound to accept and act upon the decision of the court of the domicil as regards matters within its jurisdiction." This statement is further evidence of the increasing tendency, already noticed in previous numbers of the *Year Book*,[1] of the English courts always to accept in matters of personal status the decision of the court of the domicil as final; but it must be admitted that it has been recently held that a foreign divorce cannot be recognized in England, even if a divorce of the domicil, if the Respondent had no notice of the proceedings.[2] On the other hand, the cases seem to show that a foreign divorce cannot be impeached for fraud unless the fraud related to facts upon which the *jurisdiction* of the foreign court was based. Fraud relating to facts affecting only the merits of the decision is not a ground for refusing to recognize a foreign divorce.[3]

The Scottish case of *Rudoyevitch* v. *Rudoyevitch* (Case No. 16) is of interest as showing the principles applied by the Scottish courts with regard to the rights of custody and guardianship over a child in Scotland of a person entitled thereto under the law of the foreign country which is that of the legal domicil of the child.

Case No. 16. Rudoyevitch v. *Rudoyevitch*, 1930, S.C. 619.

R., a Jugoslav national, domiciled and resident in Jugoslavia, had married a Scots woman in 1921 and there was a child of the marriage. The wife left him and took the child to Scotland where she remained and refused to give him custody of the child. In 1929 R. obtained a decree of divorce and for custody of the child from the courts of Yugoslavia, and in 1930 he applied to the Scottish courts for an order that the child should be returned to his custody, contending that the Scottish courts must recognize the right conferred on him by a decree of a competent court of the domicil. The objections of the wife to the order were various allegations suggesting that it was not in the interests of the child to make it. The Scottish court held that the decree of the Serbian court as regards custody of the child, being a decree in a matter of personal status by a court of the domicil, was one which gave R. a title to custody which must be recognized in Scotland, but when a Scottish court was asked to lend its aid to a foreign guardian to obtain the custody, it was open to the Scottish court to consider the interests of the child in deciding whether it should make an order, since a Scottish court could, if the exceptional circumstances warranted it, protect a foreign child in its jurisdiction even against its legal guardian, and therefore it was open to the court to make certain inquiries of the petitioner as to his plans for the reception and education of the child and to consider his answers before it made an order. The inquiries were made and, the answers being found satisfactory, the order was made.

In re Vocalion (Foreign) Ltd. (Case No. 17) was a case where the English court refused to make an order restraining the bringing of proceedings in a foreign court. The English courts naturally cannot, and never purport to, make orders directed to a foreign court as to the proceedings which the latter should or should not entertain, but they can make an order against a person, ordering him not to bring or continue proceedings in a foreign court, and the order may be effective if the person is within the jurisdiction and can be committed for contempt if he disobeys, or has assets there which can be seized, or is a party to litigation in England. The power to make such an order is a discretionary one which will be exercised where the court is satisfied that its order will be effective and that it is in the interests of justice that it should be made. There are various types of cases where such orders have been made.[1] In the present case it was sought to restrain the bringing of proceedings in a foreign court against a company because it was being wound up in England.

---

[1] 1928 at p. 126; 1929 at p. 247; 1932 at p. 167.

[2] *Rudd* v. *Rudd*, [1924] P. 72. *B.Y.B.* 1926 at p. 222.

[3] *Batey* v. *Batey*, [1906] P. 209, 218.

Case No. 17. In re Vocalion (Foreign) Ltd., [1932] 2 Ch. 197 (Maugham J.), 48 T.L.R. 525.

The Vocalion Company was a company incorporated in England. It carried on business in Victoria, Australia, where it was registered as a foreign company with G. as its registered agent. The Bank of New South Wales was a corporation incorporated in Australia, where its principal business was, but had a branch in England where it was registered under Section 344 of the Companies Act 1929 (i.e. as a foreign company having a place of business in England). The Bank claimed that a debt was owing to it by the Vocalion Company arising out of transactions in Australia, and commenced proceedings in the courts of Victoria against the Vocalion Company to recover the debt and also to enforce certain other claims, the Victorian writ being served in London on the Vocalion Company in November 1931.

On January 11, 1932, an order was made in the English courts for the winding up of the Vocalion Company, and the liquidator of the Vocalion Company took out a summons applying for an order from the English courts restraining the Bank from continuing its proceedings in Victoria against the Vocalion Company without the leave of the court. The order was sought under the general equitable jurisdiction of the court to restrain the institution or continuance of proceedings in a foreign court by an order *in personam* against a party.

The application was based on two grounds: (*a*) upon section 177 of the Companies Act 1929, which provides that "When a winding up order has been made . . . no proceeding shall be proceeded with or commenced against the company except by leave of the court", which section it was contended applied to proceedings brought abroad as well as in England; and (*b*) upon the ground that (even if this section did not apply to foreign proceedings and the matter was one of discretion) that such an order was desirable to prevent the Bank, as one creditor, getting a larger share of the assets of the Company than the other creditors.

Held by Maugham J.:

(1) Section 177 of the Companies Act did not apply to proceedings other than proceedings in a court of Great Britain. The Imperial Parliament is not to be deemed to be legislating respecting colonial courts or Indian courts unless they are expressly mentioned, and cannot legislate respecting courts in countries which are foreign in the strict sense of the word.

(2) The English courts, though they cannot make an order against a foreign court, can, by the exercise of their equitable jurisdiction *in personam*, make an order restraining a person from bringing proceedings in a foreign court, provided that such person is subject to their jurisdiction and can be served with the order (conditions which the Bank fulfilled since it had an office in England where it carried on business), and such orders have been made against creditors of a company being wound up in England restraining them from taking proceedings against the company elsewhere, but the making of the order was a matter of discretion.

---

[1] See *inter alia B.Y.B.* 1929, p. 257, *Ellerman Lines Ltd.* v. *Reed*, [1928], a case where such an order was made because the bringing of the proceedings in Turkey was fraudulent and a breach of contract between the parties.

(3) Such an order should not be made unless it can be effectively enforced against the person restrained (viz. by action against assets belonging to him within the jurisdiction or, in the case of an individual resident here, by committing him to prison for contempt) and unless it would be in the interests of justice to do so. The Vocalion Company had been carrying on business in Australia and might have incurred many debts there. If the Bank could be and was restrained from taking proceedings there to recover its debt, there might be other Australian creditors who could not be restrained, and the result of restraining the Bank might not be to increase the assets available for distribution in the liquidation in England, but only to prejudice the Bank in comparison with other Australian creditors. The Bank had not claimed as a creditor in the liquidation in England; an order might also be made for the winding up of the Vocalion Company in Australia, and it would be impossible to contend that the Bank, a foreign creditor, should not be allowed to prove his debt in Australia and to bring an action there if the law in Australia allowed it.

For these reasons it would not be in the interests of justice for such an order to be made in the present case.

It has now been decided in the two cases which are set out below that the Administrators of enemy property (German, Austrian, Hungarian, or Bulgarian), appointed under statutory authority by the Crown to collect and distribute the property, rights, and interests in this country of ex-enemy nationals, charged under the different Peace Treaties to meet certain claims against these countries, and given power to recover property or debts owing to ex-enemy nationals, are in the position of agents of the Crown and as such can avail themselves of the ordinary rule that the Statute of Limitations does not operate to bar claims by the Crown. It is curious that this point should have remained unsettled till the year 1931.

Case No. 18. The Administrator of Austrian Property v. *Russian Bank for Foreign Trade.*[1] 47 T.L.R. 550 (Swift J.), 48 T.L.R. 37 (Court of Appeal).

The Administrator sued the defendant Bank, a Russian corporation having an office in London, as acceptors of two bills of exchange dated May 1914 and payable three months after date at another bank in London. The Austro-Hungarian Bank had become indorsers and holders of the bills. The War broke out in August 1914 before the date for payment arrived, and, by legislation passed at the time, payment became suspended and remained so till January 1921. The Austro-Hungarian Bank was a national of the former Austrian Empire, and the Administrator claimed that the bills were property, rights, and interests charged under Article 249 (*b*) of the Treaty of St. Germain and that he was entitled to claim for payment under them by reason of the Treaty of Peace (Austria) Order in Council 1920, Article 1 (x) (*e*). The bills were presented by the Administrator for payment in September 1923, and dishonoured. The writ in this action was issued in November 1929. As more than six years had elapsed between the date of the demand for payment and the issue of the writ, the Defendants contended that the right of the Administrator to sue had become barred by the Statute of Limitations; they relied upon the provisions of paragraph (*ee*) of the Order in Council, which states that the Administrator "shall have power to enforce payment thereof and for that purpose shall have all such rights and powers as if he were the creditor", as showing that, even if the Administrator was in the position of the Crown, and even if in general the Statute did not operate to bar the right of action of the Crown, the Order had deliberately placed the Administrator in the same position as the private creditor as regards his right to recover payment, and he was not therefore able to rely on any right on which the creditor could not have relied.

---

[1] N.B. The question of the continued existence of this bank as a juristic person was not raised in these proceedings. Cp. Case No. 4 above, where an order for the winding up of this bank was made soon afterwards on the ground that it had ceased to exist. Query whether this judgment is valid.

The Administrator contended that the Statute of Limitations did not run against him because he was in the position of the Crown and the debt was not statute barred when it vested in him. (It was immaterial for the purposes of the present case whether the period of six years should be calculated from January 1921—the date of the maturity of the bills—or from September 1923—the date of the demand for payment. In either case more than six years had expired before the writ was issued, and in neither case had the six years expired before the right to sue became vested in the Administrator.)

Held by Swift J.:

That the Administrator was in the position of the Crown; the debt was not statute barred when it vested in the Administrator; the Statute did not operate to bar a right of action vested in the Crown, and paragraph (*ee*) of the Order in Council only intended to confer on the Administrator all the rights of the private creditor and did not intend to limit his rights to those of the private creditor by taking away from him the privileges which he could otherwise claim as representing the Crown. Therefore the right of the Administrator to sue was not barred by the statute.

On appeal to the Court of Appeal: the decision of Swift J. was affirmed.

In an earlier case decided by Lord Darling (*The Administrator of Hungarian Property* v. *Fine Gold*, 47 T.L.R. 288), a case which, curiously enough, is nowhere referred to in the report of the case digested above, a decision to the same effect was given.

REVIEWS OF BOOKS

Académie de Droit International: Recueil des Cours, 1931. Vols. 35–8 of the series. Paris: Sirey.

Little more than an indication of contents can be given by the reviewer of a publication which contains 24 articles on different topics and no less than 2,836 pages.

The admirable series of brief but scholarly expositions of *Les règles générales du droit de la paix* was continued in 1931 by M. Bourquin, and the reviewer ventures to suggest to the Curatorium of the Academy that they would render a service, especially to younger students, if they would make these valuable contributions separately obtainable. The sheer bulk of the *Recueil* is becoming a serious problem even to the specialist, and these and other contributions of great general interest are in danger of being practically lost if they are only available in the *Recueil* along with others which, however valuable in themselves, are inevitably more specialized in their appeal.

The only British lecturer in 1931 was Dr. Colombos, who gives a terse and clear outline of the British conception of private international law. M. Castberg has an article of great interest on the difficult subject of *Excès de pouvoir.* Professor Garner writes with his usual lucidity on recent tendencies in international law. M. Roux's article (*L'entr'aide des Etats dans la lutte contre la criminalité*) contains an interesting account of the practical co-operation of police forces. Incidentally he perpetuates a misunderstanding of British extradition practice by implying (II, 128) that we require guilt to be *proved* before granting extradition. M. Dumas's article on state responsibility for crimes against foreigners and M. Verdross's more general discussion of the treatment of foreigners are also very interesting.

Two articles deal with the interrelation of international and national systems. M. Mestre (*Les traités et le droit interne*) is especially concerned with the application by French courts of the maxim *les traités ont force de loi*; M. Mirkine-Guetzévitch surveys the wider field of *Droit international et droit constitutionnel.*

Two subjects, only too topical in their appeal, are prominent in these volumes. The League is treated by M. del Vecchio (on the philosophical side); by M. Rutgers (the place of war and the proposed "harmonization" with the Pact of Paris); and by M. Rauchberg (the juridical obligations of Members). The latter usefully points out that the technical and juridical organization of peace is nearly solved; the political problem is not. And four writers (M. Simoes, Mr. Patterson, M. Cassina, and M. Jèze) treat primarily of economic rather than legal problems of international relations.

J. L. B.

Annual Digest of Public International Law Cases 1919–22. Edited by Sir John Fischer Williams, K.C., and Dr. H. Lauterpacht. London: Longmans, Green & Co. 510 pp.

The two previous volumes of the *Digest* cover the years 1925–8, and a further volume to be published before long will cover the years 1923–4, thus completing with the present volume the whole period from 1919 to 1928; and it is highly gratifying to learn that, with the generous assistance of the Carnegie Endowment

Fund, the work seems likely to be continued, for it is of inestimable value to all engaged in the study and practice of international law, and indeed of the law *tout court.* Dr. McNair has been succeeded in the editorship by Sir John Fischer Williams, but the former's valuable assistance will be available in the Advisory Committee which has now been joined also by Lord Atkin and Lord Tomlin.

The present volume includes 34 decisions of international tribunals and some 300 decisions of the national courts of 30 countries. The scheme of the work is unaltered, save that the digests tend to be somewhat fuller, which is an improvement. Digests in the strict English sense are not really sufficient where the original report is not readily available, and the end in view, which has on the whole been successfully achieved, is to strike a happy mean between a digest and a report.

As before, an enormous variety of subjects comes under review, but the characteristic feature of this volume is, by reason of the period covered, the number of cases dealing with problems arising out of the termination of the War. Thus there is a series of decisions by national courts as to the position of the new states and questions of state succession; as to the effect of war on contracts; as to enemy character of corporations, &c.

Another batch of cases relates to the immunity of states and state-owned ships from suit, and here it is interesting to observe a sharp divergence between the views held by the courts of different countries. This is one of the exceptions from the general impression of unity as regards municipal decisions on matters of international law.

Among decisions of international tribunals the outstanding case is that of the *Norwegian Ships* between Norway and the United States, before the Permanent Court of Arbitration, but there are some interesting awards by Mixed Claims Commissions and other bodies, in addition to reports of cases in the Mixed Arbitral Tribunals set up under the Peace Treaties. The first three advisory opinions of the Permanent Court of International Justice are also included.

One wonders, when observing the wealth of material here collected, how it was possible to do without this work.

A. P. F.

Folkerett i Fredstid. The Law of Nations in times of Peace. A posthumous manuscript by Dr. Francis Hagerup, completed and published by Dr. Thorvald Boye. Oslo: O.Chr. Christiansens Boktrekkeri. 1932. 303 pp.

Francis Hagerup, the eminent Norwegian jurist and diplomat, who was a delegate to the Hague Conference of 1907 and to the Assembly of the League of Nations in 1920, and a member of the commission which sat to draft the rules of the Permanent Court of International Justice, died in 1921. Among the papers he left was the manuscript of a handbook on the law of nations, a work which, however, he had not touched since 1914. Dr. Thorvald Boye, a judge of the Supreme Court of Norway and the President of the Norwegian branch of the International Law Association, recently undertook the dual rôle of editing this manuscript and of bringing it up to date.

The eighteen years which have elapsed since Hagerup put his manuscript aside represent a period of unparalleled activity in the development of international affairs. The work pays due regard to the historical and retrospective aspect, but it has been edited in full appreciation of current questions and requirements; a section deals comprehensively with post-War development from the first of the peace treaties to the Briand-Kellogg Pact, and a new feature in this type of work is the attention devoted to the conferences and congresses of various kinds which, together with ministerial and departmental meetings, to-day play a considerable and increasing part in the discussion and settlement of international affairs, both political and cultural.

Of more than usual interest, especially to maritime nations, is the section dealing with territorial waters, which includes a statement of the Norwegian point of view upholding a limit of four nautical miles as against the three-mile limit accepted by the Powers signatories of the North Sea Convention of May 6, 1882.

The volume is suitably annotated and indexed, and wide sources have been drawn upon (with due acknowledgment) for reference purposes. The work is of a scientific nature, but the style and manner of treatment make for unusually interesting and easy reading.

Although primarily intended for the use of Norwegian students and jurists, the work deserves greater publicity than that naturally afforded by the language of its authors, and it is, therefore, to be hoped that Dr. Boye will be able to prepare an English translation.

J. C. Aird.

Principes de droit international privé (2nd volume). By Prof. E. Bartin. 1932. Paris: Editions Domat-Montchrestien 522 pp. (65 fr.)

In the second volume of his treatise Professor Bartin deals with the application to the various subjects of private international law of the system expounded in his first volume for the solution of the conflict of laws. He bases this application on the same fundamental principle, already previously enunciated by him, that private international law consists solely in the exercise by a state of its sovereign rights in the field of private law. Such sovereign rights are only limited by the restrictions which the state imposes upon itself either by compliance with the provisions of a treaty to which it is a party or in the interest of its absolutely necessary relations with the other states. This principle approaches in effect more closely than any other continental doctrine expounded in recent years the Anglo-Saxon conception of the conflict of laws.

In his examination of the exercise by a state of its sovereign rights in private law, the author adopts what may perhaps be termed an original classification by dividing his subject into three main categories: (1) the protection of personal or family rights, which he describes as the "domain of personal law", (2) the exigencies of international commerce and the protection of foreigners, or the "domain of local law", and (3) the security of proprietary rights, or the "domain of territorial law". Outside the sphere of sovereign rights, the author establishes a fourth classification governing those rights which are left to the free will or the intention of the parties in their contractual obligations, and which he describes as the "autonomy of the will".

The present volume deals with the first and second of these categories only, and leaves the other two categories for a third volume, to appear in a year's time.

Professor Bartin must be congratulated on having written such a very valuable treatise, full of interesting and readable matter, and containing an exhaustive analysis of both the theoretical and practical aspect of his subject.

In particular, his review of French decided cases is very good, especially in a book principally intended for a continental reader, who does not usually attach much importance to judicial precedents.

C. John Colombos.

International Government. By Clyde Eagleton, Professor of Government, New York University. 1932. New York: The Ronald Press Company. xx+672 pp. ($4.)

This volume has been written to follow up a proposal, made at a Conference of Teachers of International Law in 1925, that "International Government" was a suitable subject for a lecture-course in United States Universities. Granted the object aimed at, the author is to be congratulated on his success. He has produced a work which has the chief merits of a good text-book: it is well arranged, concise, accurate, and, within its limits, thought-provoking. It is the fault of the subject that much of the latter part of the book is purely informative; but the final chapters on the Renunciation of War and on Neutrality do something to redress the balance.

The book is divided into five parts, devoted respectively to the Community of Nations, its membership, the Machinery of International Intercourse, the League of Nations system, and the Control of War, each of the 19 chapters being well documented. The first part, for which the author has only allowed himself 86 pages, is the most interesting, and certainly also the most useful as teaching material, since it introduces the student to the controversies involved in the very conception of "international government". These are excellently if too summarily presented, and one regrets that the author has not the space to develop his own views and criticisms at greater length. Some of the *obiter dicta* scattered through the earlier pages suggest that he would have been happier in discussing the nature of a community, or in tracing the transition of the idea of sovereignty from Bodin to Hegel and Jellinek, or in steering a neat course between Naturalists and Positivists, than in describing the working of what he entitles, somewhat hesitatingly, the machinery of "international government". The most unsatisfactory portion of this section is the opening chapter on the community of nations. We are rushed in seven pages from primitive man with his "instinct of sociability" through the Greek City-State, the Roman Empire, feudalism, the Peace of Westphalia to the Industrial Revolution as the creator of the "interdependence of nations". In the next section this material interdependence is made the basis for the assumption of the existence of a "community". As "evidences of the existence of a community" (pp. 16–19) there are adduced four factors: (1) "the emergence of law"; (2) "unofficial organizations" (including the World Conference of Educational Associations, the Olympic Games, and the World Parliament of Religions which "meets occasionally"); (3) official organizations, including the pre-War international administrative bodies and the League of Nations, and lastly (all as evidence of the existence of a world community), the inter-allied wartime organization. It is a real pity that the author has here been content to repeat *clichés* rather than to undertake the task, which would clearly have been much more congenial to him, of sifting reality from make-believe and of grappling with what is after all the central problem of his subject—how to develop something worthy to be termed a social consciousness throughout the existing area of material interdependence.

Alfred Zimmern.

Fontes Juris Gentium. Series B, Sect. I, Tom. I, Pars I, Digest of the diplomatic correspondence of the European States, 1856–71. By A. N. Makarov and Ernst Schmitz, under the general editorship of Viktor Bruns. Fasciculus I. lxxiii+432 pp. Berlin: Carl Heymanns Verlag. (Rm. 35.)

The plan of this monumental enterprise was described in the *Year Book* for 1932 at p. 199, and this is the first instalment of Series B, which is to consist of extracts from diplomatic documents. The extracts chosen will not necessarily state rules of international law—on that point the reader is intended to exercise a free judgment—but they will refer to matters which are in themselves susceptible of regulation under that law and thus throw light on state practice in relation to such matters. They are arranged systematically under subject headings—Foundations, Subjects, Territory, &c. The magnitude of the editors' task may be seen from the list of sources consulted, which occupies no less than 24 pages. As a guide to the researcher the value of their work needs no emphasis.

J. L. B.

The Permanent Court of International Justice. By A. P. Fachiri. Second Edition. Oxford University Press. London: Humphrey Milford. 1932. 416 pp. (21*s.*)

This is the second edition of Mr. Fachiri's work. The first edition appeared in 1925, and the second fully sustains the reputation which the first has already acquired, as being by far the most useful book—at any rate in the English language—on the Court for the practitioner in international law.

The work consists of sections on the history of the Court (Chapter I), the organization of the Court (Chapter II), Jurisdiction (Chapter III), Procedure (Chapter IV), and there is a short chapter at the end (Chapter VII) on the relations of the Court and the League of Nations. There are appendices in which all the principal documents in connexion with the Court are set out, such as the Statute and Rules of Court, the Protocol of signature of the Statute, including the Optional Clause, and the most important resolutions of the League in connexion with the Court. The two new Protocols, relating respectively to the accession of the United States and the revision of the Statute, which have not yet come into force, are also included.

It is all carefully, soberly, and sensibly done. Mr. Fachiri is a safe guide, because in most useful footnotes he gives references to documents of the Court in support of statements which he makes in the text, and where a question is doubtful or unsettled he frankly states the position.

The only criticism which the present writer has to make concerns the two chapters (V and VI) which are entitled "The Work of the Court" and contain in 193 pages a series of full digests of all the judgments and advisory opinions given up to date. Like the rest of Mr. Fachiri's work, these digests are well done, but it is obvious that, as the Court gives more and more decisions, it will be impossible, for reasons of space alone, to continue to treat the material in this manner. Moreover, is this method of treatment really that which is most useful to the persons who will most often avail themselves of this work? It may be useful for the international practitioner to have a convenient short list of the actual points decided by the Court (viz. a list of the treaty provisions interpreted, &c.), but this could be given in four or five pages. For the rest, what he most requires and what he would most desire to find in a book such as this is information, conveniently set out, on all rulings and decisions of the Court on points of substantive law and of procedure which may arise in other cases. Information on decisions of the Court in matters of procedure would most conveniently be found in that chapter which deals with procedure, and in connexion with the particular topic or point discussed in the text. For instance, a discussion of parts of the *Mavrommatis* case would be very appropriate on p. 62, of the *Serbian Loans* case on p. 70, and of the *Free Zones* case (last phase) on p. 72. Decisions on points of substantive law might be discussed in a separate chapter under appropriate headings. This suggestion is earnestly recommended to the author for his consideration in connexion with the next edition of his work. Though the full index, coupled with the treatment of these points in the digests, does make it possible to use Chapters V and VI for this purpose, the other method of treatment would have great advantages.

A short note, either at the beginning or the end of the book, setting out what the different series of the Court's publications contain would also be most useful.

E.

L'Organisation des Commissions de Conciliation d'après les Traités suisses. By Stojan Gavrilović. 1932. Paris: Recueil Sirey. xx+222 pp. (40 fr.)

In his careful analysis of the organization of the conciliation commissions set up under the Swiss treaties, Dr. Gavrilović elaborates an interesting thesis. The establishment, he suggests, since the War of a network of treaties providing for the creation of special conciliation commissions to settle disputes between the signatories, has been in the main promoted by the suspicion of the smaller Powers that the creation of the Council of the League of Nations was a device of the great Powers designed to substitute for the pre-War Concert of Europe a procedure which would admit of the legal exercise of their political power. The effect sought, then, by the smaller Powers has been to nullify those provisions of the Covenant which attribute to the Council the power to intervene under certain circumstances in a question which is the subject of dispute between two states. At the same time, Dr. Gavrilović does not fail to point out that the First Assembly, basing itself on Article 15 of the Covenant, refused to recognize any conciliation procedure, and that it was only in 1928 that the Ninth Assembly adopted a resolution inviting states to become parties to the General Act.

I. W. Y.

Le Droit International Public de la Mer. By Gilbert Gidel. 1932. Paris: Librairie du Recueil Sirey. Tome I, x+530 pp., Tome II, 393 pp.

It is not often that a reviewer has the pleasure of welcoming a work which appears to be destined to become a classical authority on the subject with which it deals. Professor Gidel's work belongs to that class. The fact that these two volumes are to be followed by others to complete the subject shows the magnitude of the scale on which the work is planned, and its execution, as illustrated by these two volumes, is worthy of the conception.

A detailed review would far exceed the space available, but so that readers may form an idea as to whether the reviewer's judgment is correct, an outline of the contents must be given. Volume I contains an introduction dealing with the nature, sources, and domain of Public International Maritime Law and a classification of the areas to which it applies. This is followed by a chapter on the ship, its juridical nature, and the distinction between public and private ships: then comes an exhaustive bibliography. These topics take 150 pages. Then follows the first part, entitled "La Haute Mer" (The High Seas), which is divided into 8 books, subdivided into chapters, which deal with: the principle of the freedom of the seas; the juridical nature of the high seas; the legal position of ships on the high seas; the regulation of navigation in peace time; special jurisdiction on the high seas; the protection of the products of the sea; the permanent privative use of certain parts of the high seas (e.g. sedentary fisheries, &c.) and the atmosphere above the high seas.

Volume II contains the second part and is entitled "Les Eaux Intérieures", which we may call "National Waters". It is concerned with portions of the sea, other than those known as territorial waters (these are to be discussed in the third volume), such as roads, ports, and harbours which are governed by maritime international law. This volume contains four books, subdivided into chapters, dealing with: The nature and general condition of "Interior Waters", Admission of public and private vessels, and The position of public and private vessels in such waters.

As regards the characteristic of the high seas, Professor Gidel prefers to avoid the ambiguities of the Latin terms *res nullius* and *res communis* by avoiding any definition, and adopts the resolution of the Institut de Droit International, adopted at its Stockholm meeting in 1928, which declared that the freedom of the seas implies certain consequences such as freedom of navigation, &c. (i. 224). The author rejects the doctrine of the territoriality of merchant ships, and this leads, after a lengthy examination of the judgments, to an opinion adverse to that of the majority of the judges in the *Lotus* case. The traditional views of France regarding the sanctity of the flag in time of peace are upheld, so that any attempt by a warship to visit foreign merchant ships on the high seas in time of peace, except under a treaty right, is condemned. The author rejects the view usually adopted by British writers on *The Virginius* case, that "self-defence" may justify the violation of the rule. The divergent points of view under this head between Great Britain and France regarding the suppression of the slave trade and of the liquor traffic in the North Sea are also shown.

In his treatment of *les eaux intérieures* Professor Gidel accepts the principle of the sovereignty of the state over these waters, but he points out that the use of this word is in the modern sense, which he explains as "la souveraineté c'est la compétence qu'un Etat possède sur la base du droit international: elle est par suite soumise aux limitations que l'Etat a acceptées par convention et à celles qui résultent des règles du droit international" (ii. 35). Regarding the alleged difference between the English and French positions as regards the position of private ships in their ports and harbours, he is of opinion that "il n'y a pas de système français sous la forme d'un principe théorique opposé à la règle anglaise" (ii. 87).

It should be added that these two volumes, as well as the third which is to follow, are concerned only with maritime international law in time of peace. The publication of the third volume will greatly increase the usefulness of Professor Gidel's work, as it is to have a subject index which is lacking in these two volumes.

A. Pearce Higgins.

La Coutume en droit constitutionnel interne et en droit constitutionnel international. By Yvon Gouet. Paris: Pédone. 1932. 167 pp.

The significance of the term "constitutional" international law in the title of this study is not very clear. From the author's explanation and from the general treatment of the subject it appears to include the whole of public international law. The first part of the book discusses the basis of the binding force of custom and the methods of its formation and proof. The second part compares its binding force with that of other legal rules and examines the modes of its modification and abrogation. The book is dedicated to Professor Le Fur, and the treatment belongs to the school of thought with which his name is associated.

J. L. B.

Lehrbuch des Völkerrechts. (Second and last Part.) By Alexander Hold-Ferneck. Leipzig: Felix Meiner Verlag. 1932. xi+332 pp.

The first volume of this text-book was reviewed at length in a former issue of the *Year Book*.[1] The present volume affords no occasion for a change in the reviewer's opinion as to the character of the book. The author devotes a spirited preface to a defence of his method of putting into the foreground the shortcomings of international law. He is a realist and warns against attaching undue importance to treaties of pacific settlement. "If Governments are peacefully minded, then there is no need for arbitration treaties. If there is no will to peace, then the effect of such treaties is inconsiderable" (p. vi). He is impatient of uncritical pacifism. "Who teaches law, must at any cost defend what is right, that is to say he must 'fight and hate' a peace which is built on injustice, and he must not condemn a war whose purpose is to make right victorious" (*ibid.*). The duty, he says, is to forge the spiritual weapon to enable youth to resume the fight for justice. Accordingly, he undertakes to develop in detail in Parts 2 and 3 of the book the doctrine of the invalidity of imposed treaties with a view to making the results available in the struggle against the Peace Treaties.

Professor Hold-Ferneck does not deny that treaties imposed by force are valid. But they are, in his opinion, valid only if they are not in conflict with previous conventional obligations. Thus the Peace Treaty of Versailles is invalid because it conflicts with the terms of the preliminary peace treaty as constituted, in the author's view, by the American Note of November 5, 1918, in which President Wilson reproduced the Allied reply agreeing to regard the former Presidential pronouncements as the basis of the future peace treaty (p. 153). The author, who is a lawyer of distinction, writes well and learnedly, and the short volume is interesting throughout. But the reader must reconcile himself to an occasional *tour de force* in the author's arguments. Thus, for instance, while questioning the soundness of the rule *pacta sunt servanda*, he points to treaties which become impossible of fulfilment, for example, "a treaty to cede an island which shortly before the conclusion of the treaty, without the knowledge of the parties, disappears into the sea", or "a treaty of navigation relating to a river which dries up in the course of time" (p. 173).

H. L.

---

[1] (1931) p. 220.

Die Immunität der Nicht-Diplomaten: ein Beitrag zur Kodifikation des Völkerrechts. By Dr. Siegmund Kauffmann. Frankfurter Abhandlungen zum modernen Völkerrecht, Heft 33. Leipzig: Universitätsverlag von Robert Noske. 1932. xvii+159 pp.

This study of the immunities of non-diplomatic agents is divided into a practical and a theoretical section, of which the former is devoted to the various precedents for the grant of such immunities and to the existing treaty provisions and legislative enactments on the subject. This division is not easy to maintain, and militates against unity of treatment. The work is very naturally based on a review of diplomatic immunities, which should repose, Dr. Kauffmann concludes, on the theory of *ne impediatur legatio.* This theory, slightly adapted as *ne impediantur negotia,* he takes as his standard for examining the immunities required by non-diplomatic agents. Such immunities, owing to the greatly extended number of persons involved, must, he holds, be restricted to the minimum necessary to secure the unimpeded conduct of the agent's functions, but even this minimum represents a very substantial body of privileges.

The book bears the stamp rather of a doctoral thesis than of a mature and authoritative study. The frequent quotations of French, and occasionally of English, texts are full of mistakes, some of which completely obscure the sense. The author is definitely misleading in his citation (p. 22) of treaties between Great Britain and France, Belgium and Denmark in justification of the grant of immunities to mail-carrying vessels, since he omits to mention that all these treaties have lapsed and have been replaced by the Universal Postal Convention of 1929, which contains no corresponding provision. The work is clearly not one whose authority on specific points can be accepted without question or verification, but as a general review of the subject it will not be without utility to students.

P. M. R.

Das deutsche internationale Privatrecht auf Grundlage der Rechtssprechung, dargestellt von Hans Lewald, Professor an der Universität Frankfurt a. M. Verlag von Bernhard Tauchnitz, Leipzig. 1931. xvi+386 pp.

Internationales Privatrecht erläutert von Dr. Leo Raape, Professor an der Universität Hamburg (*I. V. Staudingers Kommentar* zum Bürgerlichem Gesetzbuch und dem Einführungsgesetz, VI. Band, *Einführungsgesetz,* 2. Teil, Art. 7–31). Neubearbeitete Auflage. Schweitzer Verlag (Arthur Sellier), München. 1931. xi+855 pp.

Deutsches internationales Privatrecht. Unter besonderer Berücksichtigung des österreichischen und schweizerischen Rechts von Dr. Arthur Nussbaum, Professor an der Universität Berlin. Verlag von I. C. B. Mohr (Paul Siebeck), Tübingen. 1932. xx+539 pp.

Die Grundlagen des deutschen internationalen Privatrechts von Dr. Georg Melchior. Berlin und Leipzig. 1932. Verlag Walter de Gruyter. xxxi+558 pp.

The four books which we wish to notice in this review have one feature in common. Their authors, though fully equipped with knowledge of theory and of foreign law, have built on the solid foundation of cases decided by German courts and of German statutory provisions as to the rules of conflict of laws. "The theory had to recede to the background" (*Lewald*, p. vii), the views of a judge were considered to be of more weight than a scientist's opinion (*Nussbaum*, p. iv), in a conflict between the case law and theory case law should prevail (*Melchior*, p. 19), the statutory rules had to be interpreted in the light of case law (*Raape's* work is in the form of a commentary to a part of the German Civil Code).

The German Civil Code has adopted the principle of nationality instead of domicil (p. 78, *Lewald*, p. 8). It contains mainly "onesided rules of conflict" (*einseitige Kollisionsnormen*) defining when German law applies, and only exceptionally stating when and what other law would apply (p. 81, *Melchior*, p. 55). The Code deals with the questions of status of persons, family relationships, and succession. Rules of conflict of laws dealing with rights of property to things and with rights arising out of economic intercourse ("Verkehrsrecht", e.g. contracts) have been developed by the jurisprudence of the German courts.

Raape's Commentary seems to give not only the statutory rules of conflict but also the jurisprudence. It does not cover the whole field of German private international law as it only deals with and comments on the statutory rules of conflict. References to rules of conflict in other systems of law are numerous and valuable. A great number of hypothetical cases is discussed. A perfect book of reference, *Raape's* treatise is not easy to use for systematic study of the matter. The index of 17 pages to a book of 838 pages is hardly sufficient and the search of a student in that gold mine of information is not easy. *Raape's* book was well received in Germany (see e.g. *Juristische Wochenschrift*, 1932, p. 2241, Rabel's *Zft.*, 1932, p. 294).

Lewald's work is a most remarkable contribution to the clarification of the problems of conflict of laws in Germany generally and in particular to the problems of the law of contract ("Obligationenrecht", pp. 195–285) and the law of property ("Sachenrecht", pp. 169–95)—the two parts left—in the absence of statutory rules—to the judges to formulate and develop. A list of decided cases (pp. 344–78) assists the student who wishes to go to the sources of *Lewald's* statements. *Lewald's* work seems to us to be the most reliable and clear exposition of the German rules of conflict. Lewald does not force on his readers theoretical conceptions but gives the German law as it is.

Nussbaum's book shows remarkable knowledge not only of German, Austrian, and Swiss law, but also of other systems. It gives a complete though necessarily short survey of all important problems of private international law—including e.g. international arbitration, questions of procedure, copyright. The book is eminently suitable for a foreign student because of its clarity and style.

Melchior's follows Dicey's example and contains rules formulated by the author. *Melchior's* command of theoretical knowledge is great, but he bases his work on the "living law"—the case law (p. 19). Some parts of the books are of great interest to a foreign student (e.g. Chapter XV on Renvoi and XXXIII on intention of parties in the law of contract).

The masterpiece of *Lewald*, the encyclopædic commentary of *Raape*, *Nussbaum's* perfect text-book, and *Melchior's* work have laid a solid foundation for both the study and development of German private international law of to-day. When one studies those works one sees how great the contribution of English judges and authors to private international law of other countries has been, and notes that the difficult study of case law has become in Germany almost as important as it is for an English jurist.

V. R. Idelson.

The Law of the Air. By Arnold D. McNair, C.B.E., LL.D. London: Butterworth & Co. Ltd. 249 pp. (12*s.* 6*d.* net.)

This book is primarily a treatise on English municipal law concerning the air—a topic of obviously increasing interest and importance at the present time. Public international law is only treated in so far as it is relevant, as being the basis of English municipal law on the points that arise, but, as Dr. McNair explains in his first chapter, the air, like the sea, is an international highway and states have had the wisdom to settle by international convention some of the most important principles of air law. Consequently international law and conventions in fact come into the matter to a very considerable extent and are likely to continue to do so in an increasing degree, for further international "law-making" conventions are in prospect. English common law with regard to the air is then treated in two chapters under the headings "Ownership and User of the Air and Air Space, Trespass"; and "Nuisance, Negligence and Strict Liability for Dangerous Things". The elusive and confusing maxim "*cuius est solum, eius est usque ad coelum et ad inferos*" is discussed in the most scholarly and interesting way, beginning with Roman law. Then follows a chapter on the "Statutory Liability of Owners of Aircraft for Damage", an admirable discussion of the effect of Section 9 of the Air Navigation Act, 1920, and a chapter on "Jurisdiction in respect of Aircraft", dealing principally with the complex questions of private international law which arise in connexion with aircraft and events taking place on them, some of the answers being necessarily very speculative (*vide* in particular pp. 105–6, dealing with contracts). Chapters 6, 7, and 8 deal with the Contract of carriage by air, Maritime analogies (Dr. McNair effectively supports his main proposition that an aircraft is not to be deemed to be a ship so as to bring into operation maritime law except in so far as this is expressly provided by statute), and the "Common Law Possessory Lien". He concludes with chapters on Aircraft Charter Parties and Insurance, and certain technical matters. There are also five useful appendices containing *inter alia* the texts of the Air Navigation Convention of 1919, the Air Navigation Act, 1920, and the Warsaw Convention relating to the rules for international carriage by air. It is perhaps a pity that the "Carriage by Air Act", 1932, had not been passed when the book appeared, as it contains an official English text of the Warsaw Convention in a schedule, as well as making the necessary provisions for the application of this convention as a part of English law—provisions which Dr. McNair would no doubt have dealt with in his book.

This book is in every way an admirable treatise on the subject, and the reviewer can only congratulate the author on his work.

E.

International Law in National Courts. By Ruth D. Masters. Columbia University Press. 1932. 245 pp. ($3.75.)

This book consists of an examination of the basis of the enforcement of customary and conventional international law (particular, general, and universal) in the courts of Germany, Switzerland, France, and Belgium. It therefore leads the reader into the heart of one of the principal controversies which in the past thirty years have engaged the attention of those international jurists on the continent of Europe who are primarily interested in the philosophical aspects of international law. In Great Britain and the United States most of us are content to observe and record the practical tests applied by our municipal courts in deciding whether or not to apply a rule which is alleged by one of the parties to be a rule of international law, and those tests are tolerably well defined. Accordingly, in these two countries the controversy has been neglected.

The author points out that the two main schools of thought are the "monists", led by Kaufmann, who hold that "international law and municipal law are parts of a single legal system in which international law is the higher law", and the "dualists", led by Triepel, who maintain that they are two separate legal systems so that, although international law is the higher law, it does not *ipso iure* overrule municipal law in a municipal court but must first be "transformed" into municipal law. She then proceeds to examine in great detail the relevant constitutional provisions and judicial dicta of the four countries named above with a view to estimating the light shed by them upon the controversy.

To the English lawyer the book thus forms a very useful guide to a subject which many of his continental colleagues regard as one of great importance.

A. D. McN.

Der Lotusfall vor dem Weltgerichtshof. By Dr. Walter Rebbe. Leipzig: Robert Noske. xiv+119 pp. (Rm. 5.)

This little book is No. 34 in the series of "Frankfurter Abhandlungen" on Modern International Law, of which Dr. Giese and Professor Strupp are the editors. The author gives a very full, careful, and learned account of the case and discusses at length the issues involved. As sometimes happens with the authors of monographs and the parents of only children, Dr. Rebbe has perhaps a tendency to discover more qualities in the object of his loving attention than would reveal themselves to a dispassionate observer. It is perhaps somewhat to exaggerate the importance even of the very interesting *Lotus* case to say that not only the question of the spatial extent of the validity of the rules of criminal law, but also the fundamentals of the doctrine of the Freedom of the Seas—to say nothing of the content of the conception of sovereignty—were involved. The author is a zealous defender of the judgment of the majority, but in his final conclusions he hardly seems to give sufficient weight to the fact that the only point actually decided was that the offence of the navigating officer of the *Lotus* must be taken to have been committed not only on the French ship, which was navigated negligently, but also on the Turkish ship where the fatal consequences of that negligent navigation occurred. The more general question of the limits of the criminal jurisdiction of states remains intact: on that general question the reviewer is at one with the author in thinking that international law needs further development. In process of time further decisions of the Court may give the world at any rate an instalment of what is necessary.

J. F. W.

International Servitudes in Law and Practice. By Professor Helen Dwight Reid. University of Chicago Press. 1932. xv+254 pp. ($3.)

This treatise, which is described by Dr. James Brown Scott in an interesting and appetizing Foreword as "a rehabilitation of the international servitude, whose existence and appropriateness was questioned by the arbitral award in the

North Atlantic Fisheries Arbitration of 1910", consists of a critical survey of the numerous kinds of rights created by treaty in favour of one state in or over the territory of another. Part I deals with the doctrine of servitudes in international law and includes a brief statement of the Roman law concept of the servitude. Part II, which is the real substance of the book, classifies and examines servitudes according to their purposes: (1) the distribution of the world's physical resources, such as pasturage, timber, mining, and, above all, fisheries; (2) transit and communications, by rail, river, canal, road, and air; and (3) security, that is strategic servitudes, such as garrison rights and demilitarized zones. A brief concluding chapter estimates the value of the servitude in modern international life, and is followed by a 24-page bibliography of great value, and an important and (I believe) hitherto unpublished memorandum by Dr. John Bassett Moore on the rights of the United States under their treaty of 1846 with Colombia (then New Granada).

There is no question that Professor Reid's book is the best study of this subject that has appeared in the English language, and the most up to date that has appeared in any language. She has not confined her researches to published matter, and as the result of what must have been long and patient labour amongst the archives of the United States, Great Britain, and many other countries, she has made available a mass of new information. This is particularly so, I incline to think, in her examination of fishery servitudes as in private duty bound. The purely legal side of the book could, I think, be strengthened in a later edition; for instance, the expression on page 7 "the doctrine of easements, or covenants that run with the land" suggests that these are identical. For the results of Professor Reid's researches and her skill in presenting them I am full of admiration. To the doctrinal conclusions which she draws from them I fear that I am disabled by a certain scepticism from doing full justice. The reviewer of a book on spiritualistic phenomena is clearly handicapped by not being a whole-hearted believer in ghosts. I do not feel that she is convincing upon the question whether or not international law has accepted the essentials of the concept of the servitude. It is, of course, convenient to be able to attach a generic label to rights of a homogeneous character. But I think it is true to say that the crux of the question is whether or not rights of the kind described in this book possess "a status that would outlive the treaty itself, surviving regardless of any transfer of sovereignty over those territories, save only when such transfer would result in the complete merging of dominant and servient territories under the control of a single state" (p. 21). It is, I believe, mainly in order to establish this legal implication that most of the upholders of the doctrine of international servitudes seek to justify the application of this label to the rights in question, and, heretic as I am, I venture to think that Professor Reid has not given sufficient attention to this question. It is easy to cite instances of changes of sovereignty accompanied by express assumption by treaty of the old obligation by the new sovereign which acquires the servient territory, as in the case of the Treaty of Turin of 1860. But what we want to know is whether this consequence follows automatically and *ipso iure* upon a change of sovereignty and does so because the old obligation belongs to the category of a servitude. This criticism, however, relates to a very controversial matter and, even if a just criticism, does not detract from the general value of Professor Reid's work.

A. D. McN.

A Guide to Diplomatic Practice. By the late Sir E. Satow, G.C.M.G. Third Edition, revised by H. Ritchie, C.M.G., late of the Foreign Office. 1932. London: Longmans, Green & Co. 1 vol. 8vo. x+519 pp.

It is ten years since the last edition of this book appeared, and a new edition is welcome. No man could be more qualified than Mr. Ritchie to revise the work; his years of service in the Treaty Department of the Foreign Office have given him exceptional qualifications for the task.

Sir E. Satow divided his guide into three "Books": Diplomacy in general; Diplomatic Agents in general; Congresses and Conferences. This arrangement Mr. Ritchie has maintained, while adding a fourth on the British Commonwealth of Nations and on the League of Nations.

The first comprises such questions as: titles and precedence among sovereigns, the immunities of the head of a foreign state, maritime honours, the language of diplomatic intercourse, the forms of documents, credentials, and full powers—matters on which a diplomatist abroad might suddenly find himself confronted with some question about which he cannot risk the making of a mistake.

The second book deals with the qualification, selection, duties, immunities, and privileges of diplomatic agents, with the privileges attaching to Embassy and Legation houses, the position of diplomatic agents in third states when passing to and from their posts, and with all that happens when the diplomatist's tenure of his post comes to an end.

Book III deals with conferences and international meetings and with the business of such international gatherings and the agreements which emanate from them.

Since the conclusion of the War the field of international activity has been so altered by the establishment of the League of Nations that a detailed account of the operations of the League is now an essential element in a guide to diplomatic practice. Mr. Ritchie gives an adequate account of the working of the machine at Geneva considering the limited space which he could devote to it. He also sets out the adjustments in the methods of diplomacy which have been necessitated by the change in the position of the British Dominions since 1919. A clear explanation is given of the agreements come to, and the arrangements made by the successive Imperial Conferences of 1923, 1926, and 1930, for the purpose of ensuring adequate consultation between the component parts of the British Commonwealth, as well as of the formulae which have been evolved for treaty making.

Mr. Ritchie has found it necessary to make great changes in preparing this third edition, and the precedents and examples which are quoted in the work are now well chosen. "Diplomacy by conference", as it has existed since the War and since the foundation of the League of Nations, has made a subtle change, even in the dignified practice of the Chancelleries of Europe. Mr. Ritchie has done wisely in discarding a good deal of the more antiquated material which was to be found in the second edition. The more modern precedents which he has substituted will be more useful.

Despite the amount of new material added it has been found possible to compress the work into a single volume by slightly increasing the size of the page and using rather smaller type. In its new form the *Guide to Diplomatic Practice* will constitute a most useful work.

C.

Vers la Paix Organisée. By Raul Humberto de Lima Simoes, Assistant de l'Institut Supérieur de Sciences économiques et financières de Lisbonne, Paris: Sirey. 1932. 498 pp. (30 frs.)

This work covers familiar ground without making any striking new contribution. In the first part of the book the various peace plans put forward previous to the world war are described, or rather enumerated, for 22 (including the Tower of Babel), are dealt with in well under 100 pages. There is a brief section on plans put forward during the War, in which pride of place is given to a project by a Portuguese writer, Corrêa de Pinho. The latter part of the volume deals in considerable detail with the organization and activities of the League of Nations. Suggestions are made for increasing its efficiency, along the lines generally associated with French policy. The writer lays particular stress on "moral disarmament", which he regards as the necessary prerequisite for progress in the political and legal sphere. But his suggestions for influencing opinion in this direction by "utilizing the fundamental elements of persuasion: prestige, affirmation, repetition, mental suggestion and contagion" will not commend themselves to all. The volume is infused with a spirit of generous idealism.

ALFRED ZIMMERN.

Great Britain and the Law of Nations: A Collection of Documents illustrating the views of the Government of the United Kingdom upon matters of International Law, edited by Herbert Arthur Smith. Vol. I. States. 1932. London: P. S. King & Son. 8vo. xvi+416 pp. (16*s.*)

This volume is the first of a proposed series which will endeavour to some extent to do for Great Britain what Dr. J. B. Moore's well-known *Digest of International Law* did for the United States. The aim of Professor Smith is more modest than that of Dr. Moore, in that he does not present the interpretation of international law by the courts of this country. We have given to us a documentary picture of the attitude officially adopted by Great Britain through diplomatic and executive agencies towards contemporary problems of international law, but the book, unlike that of Dr. Moore, is not an official publication. The topics illustrated in this way are five: the nature, sources, and scope of international law, dependence and inter-dependence of states, recognition of states and governments, recognition of belligerency, and succession of states and governments.

The book is as much, if not more, a contribution to diplomatic history as to the history of international law, though, as is almost invariably the case, diplomacy and law are closely related. It may possibly be objected that the extracts are not sufficiently long to give the whole story, but it appears to us that Professor Smith has made a judicious selection, and his own contributions by way of exposition are well done. The inclusion of a number of extracts from the Opinions of the Law Officers prior to 1879 not hitherto published, while they add value and interest to the work, show the difficulties under which they sometimes laboured owing to the defective statements in the cases put before them. It is interesting to note that the term "recognition of belligerency" rarely occurs in the official documents but is referred to as the recognition that the insurgents were a *de facto* government. The contrast between the attitude of H.M. Government towards the French Revolutionary Government and their attitude towards the Soviet Government is not to the credit of the "new diplomacy", nor does it appear, as Professor Smith says, to have been so far justified by its results. We hope that Professor Smith will continue this series.

A. P. H.

An International Air Force. By J. M. Spaight. London: Gale & Polden. 1932. vi+112 pp. (5*s*. net.)

This is a book for students of international relations rather than a book on international law, but it is one which everybody who is interested in disarmament would do well to read. The writer's purpose is to make people understand the difficulties and obstacles which seem to thwart all progress towards disarmament and security. Without an effective organization to ensure respect for the Covenant of the League, states are unwilling to risk their security by any substantial diminution of their armed forces, and they are unwilling to agree to clothe the League with any effective organization to compel observance of the covenants of the League, because it would involve a partial surrender of their own untrammelled control of their own affairs.

The book opens with a delightful imaginary sketch of the rapid smothering of an incipient war between Colonia and Urbania in 1938; this happy result being achieved by the swift and effective action of an international air force under the control of the Council of the League, itself able to function successfully under improved rules of procedure. Mr. Spaight then proceeds to admit that in the world of to-day this is all impossible.

He tells the story of the successive schemes which have been put forward to give the League an international police force, and the difficulties that have thwarted them. He discusses the internationalization of civil aviation and explains in another chapter that, as wars in self defence are admittedly legitimate even under the Pact of Paris, international peace cannot be assured unless the nations of the world will go one step farther and accept the idea that war begun in self defence must go no farther than self defence.

The book is a useful corrective to Lord Davies: *Suicide or Sanity* and *The Problem of the 20th Century.*

C.

International Guarantees of Minority Rights. By Julius Stone. Oxford University Press. London: Humphrey Milford. 1932. xiii+288 pp. (14*s*.)

The title of this book is perhaps a little wider than its contents; it is in fact a well-informed and well-documented study of the systems of the protection of minorities under the auspices of the League of Nations as it was established by the Minorities Treaties and as it has developed in practice at Geneva. The actual working of the system is traced through all its stages from the presentation of a petition to the ultimate disposal of the case either by a minorities committee or by the Council itself, with full references to important cases which illustrate the working of the system in practice. So far as can be judged, all published material and a certain amount of unpublished has been taken into account.

The work could have been improved by a certain amount of rearrangement which would have brought together in a logical order information which is at present scattered about the whole book; it would be more convenient if in the earlier pages an account had been given of what the procedure in fact is, with references to the successive resolutions of the Council (at present collected in an appendix) which have resulted in laying down that procedure. At present it is not till p. 84 that one finds an account of the origin and functions of the minorities committee, which is in a sense the keystone of the whole procedure, although the committee and its working have been frequently referred to before. This, however, is the only criticism to be made on a book which should be of great assistance to any one who desires to study the subject in some detail.

It is interesting to note that Mr. Stone is of opinion that in minority cases the Council is entitled to decide by a majority to obtain an advisory opinion from the Permanent Court, his view being that the arguments in favour of the view that in cases of disputes such a decision cannot be taken without the assent of the states concerned are not applicable in minority cases, since any member of the Council is entitled to submit any question arising under the treaties to the Permanent Court for a decision, and that, therefore, the principle of compulsory judicial settlement has already been introduced for minority questions.

W.

Dicey's Conflict of Laws, 5th edition by A. Berriedale Keith. London: Stevens & Sons and Sweet & Maxwell. 1932. cxxxiv+1,144 pp.

It is unnecessary to expatiate on the merits and utility of Dicey's standard work. The careful and painstaking nature of Mr. Berriedale Keith's editions is also already familiar both to students and legal practitioners. These characteristics are fully maintained in the latest edition. The general scheme of the book has been left unchanged, but the addition of a large number of new cases and of matter commenting on them, and on new legislation, has necessitated some reduction elsewhere. It has been possible to effect this in the Introduction and in the comment on Domicil and Nationality without impairing the value and substance of the argument.

The principal points upon which fresh matter is to be found are as follows:

1. The Legitimacy Act, 1926.

2. The doctrine of Renvoi. The recent cases of *In re Ross*, [1930] 1 Ch. 377 and *In re Askew*, [1930] 2 Ch. 259 have confirmed the existing general practice of English courts of taking the view that when under the rules of English law they are called upon to apply the law of some foreign country, they will apply that law in its entirety including its rules relating to the conflict of laws, i.e. the English court will place itself in the position of the foreign court and act exactly as that court would do under its own law. Thus, if that court would, in the circumstances, apply English law, the English court will accept the renvoi and apply English law.

3. Domicil. A number of recent decisions have emphasized the tendency of English courts to take a strict view of what is necessary in order to acquire a new domicil, particularly where the previous domicil was a domicil of origin. It is becoming increasingly evident that only the clearest possible proof of a genuine intention to acquire a new domicil will suffice to convince the court.

4. Jurisdiction in regard to Divorce. Certain tendencies are noticed involving a departure from the strict rule as to domicil being the sole foundation for jurisdiction to grant divorce. The Indian and Colonial Divorce Jurisdiction Act 1926 is discussed. There is also a discussion of the issues raised by the *Nachimson* case, [1930] P. 217.

5. Nullity. The *Salvesen* case, [1927] A. C. 641, and the *Inverclyde* case, [1930] P. 29, are discussed.

6. The form of transfer of Choses in Action whose *situs* is English but the assignment of which takes place abroad. The case of *Republic of Guatemala* v. *Nunez*, [1927] 1 K. B. (C. A.) 669, and other cases are discussed.

7. The validity and recognition in England of foreign decrees of expropriation.

8. Issues arising out of the recent Statute of Westminster.

In conclusion it may be mentioned that the present edition reverts to the practice of the first edition in including references to a number of important American decisions and also to certain decisions of Dominion courts.

G.

Wandlung des Neutralitätsbegriffes. By Dr. Joachim Haase. 1932. Leipzig: Robert Noske. xviii+209 pp.

This is No. 29 of the series "Frankfurter Abhandlungen zum modernen Völkerrecht", edited by Professors F. Giese and K. Strupp, and is an examination of the present law of neutrality since the foundation of the League of Nations and the signature of the Pact of Paris. The author holds that for Members of the League the basis of neutrality has changed, and that partiality has now replaced the principle of impartiality. But as regards non-members the old rules still obtain. He considers that owing to the indefiniteness surrounding the idea of war in self-defence no change has been formally made.

A. P. H.

Blockade im Weltkrieg. By Dr. Peter Albert Martini. 1932. Berlin and Bonn: Ferd. Dümmler. 146 pp.

This is No. 36 of the series "Völkerrechtsfragen" founded by Heinrich Pohl and Max Wenzel, and edited by the latter. Dr. Martini discusses the question as to whether the belligerents, especially England, observed the laws of blockade during the late War, and decides that they were not observed. His complaint on the subject of the "Hunger-blockade" is shown by the following sentence: "Englands 'Hungerblockade' war nicht deshalb rechtswidrig, weil es eine Hunger-blockade war, sondern weil es Hungerkrieg ohne Blockade war" (p. 116). Though the Orders-in-Council did not use the word "blockade", the establishment of a Ministry of Blockade and the arguments of the Foreign Office lend colour to the claim that the British and French procedure was on the lines of a blockade. The author does not refer to the decisions of the Prize Court justifying the procedure on the basis of retaliation for German and Austrian illegalities at sea, and he dismisses, as being peculiar to submarine warfare and so not germane to his subject, the question of the preservation of the lives of crews and passengers of destroyed ships (p. 3).

A. P. H.

Das Verhältnis der französischen Bündnisverträge zum Völkerbundpakt und zum Pakt von Locarno. Eine juristisch-politische Studie. By Dr. F. Krämer. (Frankfurter Abhandlungen zum modernen Völkerrecht. Edited by Professors Giese and Strupp.) Leipzig: Noske. 1932. 134 pp. (Rm. 6.)

The main purpose of this essay is to show that the various treaties of alliance and of mutual guarantee between France on the one hand, and Poland, Czechoslovakia, Roumania, and Yugoslavia on the other, are incompatible with the Covenant of the League. The same applies, in the author's view, to the treaties of alliance and guarantee concluded by the new succession states *inter se.* He argues that these treaties are in contradiction to Articles 12 and 15 of the Covenant inasmuch as the contracting parties undertake to render each other immediate assistance if attacked without provocation by a third party. They are incompatible, says the author, because the Covenant prohibits immediate assistance prior to the impartial finding of the League on the merits of the dispute. Even more startling are Dr. Krämer's views in connexion with Article 10. He argues that Article 10 forbids not only aggression but also any action calculated to restrict the "freedom of movement" (*Bewegungsfreiheit*) of states. As the French alliances aim at restricting in this way Germany's (and Hungary's) freedom of action they are incompatible with the provisions of the Covenant. And as they aim at perpetuating the existing territorial *status quo* they are inconsistent also with Article 19. Having gone so far the author has little hesitation in suggesting that these treaties are covered by the prohibition of Article 20 of the Covenant.

H. L.

Einstweilige Verfügungen des Weltgerichtshofs, ihr Wesen und ihre Grenzen. By Dr. H. G. Niemeyer. (Frankfurter Abhandlungen zum modernen Völkerrecht. Edited by Professors Giese and Strupp.) Leipzig: Noske. 1932. 108 pp. (Rm. 5.)

The question of the competence of international tribunals to indicate or decree provisional measures for preserving the *status quo* pending the decision has produced a considerable literature in recent years. Dr. Niemeyer has confined his study to a discussion of the relevant provisions of Article 41 of the Statute of the Permanent Court. This part of the monograph is instructive, in particular on account of the comparative treatment of provisional injunctions in various systems of municipal law. The opening and concluding parts are devoted to showing that important issues affecting the vital interests of states must be eliminated from the purview of international tribunals.

H. L.

Die Voraussetzungen für die Anwendung von Völkerbund-zwangsmassnahmen. By Dr. M. Röttger (Frankfurter Abhandlungen zum modernen Völkerrecht. Edited by Professors Giese and Strupp.) Leipzig: Noske. 1931. 102 pp. (Rm. 5.)

This is an able and careful study of the question of the application of sanctions under the Covenant of the League. The author distinguishes between military and non-military sanctions. The first, in his view, are those to be applied under Articles 10, 16, and 17; while the non-military sanctions are those envisaged by Articles 11, 13 (4), 15 (6), and 16 (4). He discusses in great detail the phrase "resort to war" as used in Article 16 and submits that that article does not contemplate war in its strictly technical meaning as a condition for the application of sanctions. Dr. Röttger's view on this matter has been subsequently cited with approval in a learned article published by Judge Schücking and other writers in the *Zeitschrift für Völkerrecht* (Vol. XVI, 1932, p. 541). In regard to the application of Article 11 the author is of opinion that only qualified unanimity

—i.e. unanimity exclusive of the votes of the parties to the dispute—is required. This is the view held by the overwhelming majority of those who have devoted serious study to that article, and its soundness is not necessarily impugned by the attitude of the Council of the League in the first months of the Chinese-Japanese dispute in 1931. It is useful to see Dr. Röttger quoting, in another connexion, the statements made on this matter in 1930 by Lord Robert Cecil and Signor Scialoja. The first said that he had always held that it must have been by some accident that the rule in the Covenant providing that unanimity should not comprise the parties to the dispute had only been enacted in certain cases. Signor Scialoja had no doubt that it had simply been an oversight that it had not been said that the votes of the interested parties should not figure in calculating unanimity. Both statesmen took part in the work of the League of Nations Committee of the Peace Conference in 1919.

H. L.

Verträge in Gunsten und in Lasten Dritter im Völkerrecht. By Dr. Carl Heinz Winkler. (Frankfurter Abhandlungen zum modernen Völkerrecht. Edited by Professors Giese and Strupp.) Leipzig: Noske. 1932. 124 pp. (Rm. 5.)

The object of this monograph is to consider treaties conferring rights and imposing burdens upon third states. Although the author deprecates the use of private law as a direct source of international law, he admits that the various systems of municipal jurisprudence may usefully be resorted to for the purpose of illustration. His distinction between *pacta in favorem tertii* in the "real meaning of the word" and treaties (like the Hay-Pauncefote Treaty) which merely confer favours upon third states although not new is useful. A large part of the monograph is devoted to a discussion of the Judgment of the Permanent Court in the *Swiss Free Zones* case. This seems to be the author's principal contribution to the subject.

H. L.

The Protection of Nationals. A Study in the application of International Law. By Frederick Sherwood Dunn. Published in the U.S.A. by the Johns Hopkins Press and in the United Kingdom by Humphrey Milford. 223 pp. (English price 14*s*.)

This work does not set out to be a rival to the books of Dr. Borchard or Mr. Eagleton. It is not a treatise on the international law on the "Protection of Nationals" as exemplified by arbitral decisions and diplomatic practice. It is a purely critical study of this topic as a section of international law, considered from the point of view of its application in actual practice. The author examines the conflicts of interests in which diplomatic protection has developed, and the history of this development. He investigates the operation in practice of the legal rules relating to diplomatic protection and criticizes them from the point of view both of their suitability for the purposes they are intended to serve and of their affording certain answers to the various questions that arise. In the theoretical controversy whether "risk" or "fault" is the real criterion of international responsibility for injuries to foreigners, Dr. Dunn is a partisan of "risk". The ultimate test, to which he again and again appeals, is whether or not the situation complained of is consistent with "the normal course of economic and social relations" between the nationals of different countries (see for instance pp. 119, 134, 144, 154, and 190). As Dr. Dunn admits, many of his criticisms apply with almost equal force to nearly every system of rules, municipal or otherwise (*vide* for example the chapter on the "Nature of the Legal Process").

The book is original and interesting, more useful, however, to a reader with some knowledge of the subject than to a person studying it for the first time. Moreover, the author is apt to present contradictions and paradoxes which really do not exist—to say that under the existing rules two opposite conclusions can be reached, each resting on reasoning which is logically faultless, when one of these conclusions cannot really be so justified.

A slight pomposity or ponderousness in the Introductory Chapters leads the reader (according to his temperament), to expect something greater or to fear something worse than what in fact follows. There is much that is really sound in the book.

E.

Der Völkerbund: Systematische Darstellung seiner Gestaltung in der politischen und rechtlichen Wirklichkeit. By Dr. Paul Guggenheim, Professor of International Law, Geneva, 1932. Leipzig and Berlin: B. A. Teubner. viii+281pp.

Dr. Guggenheim's small treatise deals with the structure and law of the League of Nations. In twelve well-planned chapters the author discusses the legal and political conceptions which led to the creation of the League; the legal and political problems of membership and non-membership; the fundamental obligations on which the Covenant is built, the constitutional law and organization of the Assembly, Council, Secretariat, International Court, and other organs of the League; the machinery created by the Covenant for the avoidance of war, the problems of Security, the revision of treaties, the codification of International Law, the development of economic and technical co-operation, mandates and minorities, and the general nature, methods, and future of the League.

Dr. Guggenheim's study is, in all respects, a timely and competent piece of work. He recognizes that the League is essentially an attempt to create a permanent political organization for the society of states, and that the economic and scientific development of the modern world renders this attempt a practical necessity. At the same time, his study of the day-to-day development of the institutions of the League has left him with a vivid impression of the difficulties created by the sovereign independence of its Members, and he is not tempted to paint too rosy a picture of the progress which has been made; indeed he is inspired throughout by a just sense of historical perspective.

It may be hoped that an English translation of this useful book may shortly be available.

B.

REVIEWS OF CURRENT PERIODICALS

The American Journal of International Law, 1932. (Vol. XXVI.)

Before referring to the contents of the four numbers of this quarterly journal, attention should first be drawn to the publication of supplements, containing in the aggregate more than 1,000 pages, embodying the very valuable results of the Harvard Law School Research in International Law under the direction of Professor Manley Hudson. Four important subjects are dealt with and four draft conventions are prepared, with commentaries; they deal with (1) diplomatic privileges and immunities, (2) the legal position and functions of consuls, (3) the competence of courts in regard to foreign states, (4) piracy. The fifth section is a collection of piracy laws of various countries. There may well be differences of opinion on some of the articles in the draft conventions, but there can be none as regards the value of the contribution to international law made by a body representing the international lawyers in the United States.

The January number contains articles by Professor Manley Hudson on the tenth year of the Permanent Court of International Justice; Sir John Fischer Williams on justiciable and other disputes—short but illuminating; R. E. McClendon on the two-thirds rule in senate action upon treaties—a sketch of the history of over 100 years; Thorsten Kalijarvie gives a history of the Scandinavian claims to jurisdiction over territorial waters; E. C. Bellquist discusses Finland's treaties for the peaceful settlement of international disputes; and James Brown Scott gives an account of the meeting of the Institut de Droit International at Cambridge and of the meeting of the American Institute of International Law.

The April number has an article by Professor Edwin D. Dickinson on changing concepts and the doctrine of incorporation—a valuable contribution to the historical development of international law. Professor Borchard deals with unrecognized governments in American courts—showing the difficulties of the courts in regard to such unrecognized governments, A. Holtzoff writes on enemy patents in the United States, H. H. Sprout gives examples of international law in the federal courts of the U.S.A., N. J. Padelford discusses alien religious property in China, and A. E. Hindmarsh deals with self-help in time of peace.

The July number opens with an article by Laurence Preuss on the dispute between Denmark and Norway over the sovereignty of East Greenland; P. S. Wild discusses the varieties of sanctions for the enforcement of treaties. J. Stone writes on a matter of practical importance relating to procedure under the minorities treaties. H. J. Tobin asks the question "Is Belgium still neutralized?" and answers it in the negative. Ernestine Fitz-Maurice explains the Convention for the Suppression of Counterfeiting Currency 1929, and R. L. Morrow gives an interesting account of the early American attitude towards the doctrine of expatriation.

The October number commences with an article by H. Fields, in which he makes a tour of the world and shows how immigration is closing everywhere. E. J. Hover deals with the difficulties regarding the citizenship of women in the United States. Anna O'Neill gives an account of the arbitration and award by Professor Borch, the sole arbitrator, of a dispute between the United States and Sweden relating to the detention of two motorships during the World War. The general principles governing the termination of a mandate are examined by L. H. Evans in the light of the termination of the Iraq mandate. Professor Manley Hudson gives an interesting account of the work of the short-lived Central American Court of Justice.

The editorial comments deal with questions of immediate interest and generally speaking are of greater importance than some of the articles. The book reviews are numerous and good, and there are reports of judicial decisions involving questions of international law.

A. P. H.

Revue Générale de Droit International Public, publiée par Marcel Sibert. 3^{me} Série. Tome VI. 1932. Paris: A. Pedone.

Most of the articles in this volume of the *Revue* deal with matters of topical interest.

Professor Whitton of Princeton contributes an interesting study of the steps which the United States might take to reinforce the Pact of Paris, and reaches the conclusion that, in a case where the United States was satisfied that action ought to be taken, a series of measures are possible which would not be inconsistent with the general lines of American policy.

M. Toledano discusses the situation at the opening of the Disarmament Conference, and gives a full account of the draft Convention prepared in 1930.

Baron Nolde has a long and interesting article on the problem of the Austro-German customs union, in which he traces the history of the question from 1815 and discusses the advisory opinion of the Permanent Court. He reaches the conclusion that, on the basis of the analysis of the proposal given by the judges forming the majority, their opinion should have been the reverse of what it in fact was.

Two articles deal with mandates, since Professor Delos' article on the situation of the Catholic Missions in international law is largely concerned with the position in mandatory areas, while M. Blondel contributes an article on the termination of mandates and the particular case of Iraq.

Professor Eagleton discusses the question whether only wars of aggression or all wars should be prohibited, and reaches the conclusion that, in view of the difficulty of defining the aggressor, the latter alternative should be adopted.

There are two articles on the constitutional position of the Dominions. Professor Chevallier's article on the evolution of Dominion status is quite admirable, in fact one of the best accounts in a short compass with which we are acquainted of the various stages by which the present situation has been reached. M. Lavoie of the Quebec Bar contributes a full study of the proceedings of the Expert Conference of 1929 and the Imperial Conference of 1930 and of the position resulting from the Statute of Westminster.

Among other articles may be mentioned a learned study by M. Rousseau of *La compatibilité des normes juridiques contradictoires dans l'ordre international*; a somewhat technical article by M. Delbez on territory in its relation to the state, and a discussion by M. Sandiford of neutrality in the air, based mostly on the experience of the war and the draft prepared by the conference which met at The Hague in 1922–3.

W.

Journal du Droit International, Tome LIX, 1932.

The volume for 1932 fully maintains the high standard which, for so many years past, has given *Clunet* pride of place among publications dealing with questions of private international law.

Those who are interested in the doctrine of *Renvoi* should not fail to read M. Philolenko's article on the famous *Forgo* case. He approaches the decision of the Court of Cassation from a new angle and discusses it in relation to the theory of qualifications, a point of view which has, perhaps, been somewhat overlooked in the past.

Considerable topical importance attaches to Professor Sauer-Hall's monograph on the effect of a "gold clause" in a mortgage. Post-War financial conditions have played havoc with such clauses, and the situation which led up to the Germano-Swiss Convention of 1920 and its subsequent developments furnish an admirable illustration of the difficulties which have to be encountered by foreign creditors in the event of a depreciation of national currency.

Professor Audinet's article on the decision of the Court of Cassation in the proceedings arising out of the sequestration of the Château de Chambord by the French Government during the war makes very interesting reading. This case raised curious questions as to the nationality of the descendants of Robert, who was the last of the Dukes of Parma and a member of one of the branches of the Bourbon family.

Professor Audinet also writes on the subject of the changes which it is proposed to introduce into the articles of the Italian Civil Code which deal with private international law. It would seem that the principle of nationality is still to hold sway, but in a somewhat modified form.

Mention must also be made of M. Nisot's article on "Competence" in international law, or what an English lawyer would term "warranty of authority", by representatives of nations who attend international conferences and sign conventions on behalf of their governments.

The notes of cases and book reviews are as good and as complete as ever. *Clunet* is indispensable to private international lawyers of all nations and one often wonders what would happen if they were deprived of the invaluable resources which it places at their disposal.

H. C. G.

Revue de Droit International et de Législation Comparée. Tome XIII, 1932.

The Revue de Droit International et de Législation Comparée keeps up its high standard in the four numbers published in 1932. Many of the articles deal with questions which may be described as "live" questions. Some of them are rather too philosophical and others are of national rather than general interest, but all of them are useful contributions to the science of international law.

Professor Gidel contributes an excellent article on the practice followed in the more important countries since the Great War as to the immunities accorded to state-owned vessels employed for commercial purposes, and as to the Brussels Convention of 1926 which has not yet come into force.

The protection of the interests of private individuals by international tribunals is dealt with in two articles: one by Professor Tenekides, who thinks that the world is moving in the direction of the recognition by agreement of the right of an individual to resort to such a tribunal for the protection of his interests without his claim having to be fathered by the state of which he is a national; and the other by Dr. Baumgarten, whose paper is full of information. Dr. Baumgarten upholds Dr. Verdross's opinion that issues which fundamentally are international ought to be judged by international tribunals. The article contains a useful discussion on *denial of justice*.

Professor Clyde Eagleton is the author of two articles, one on the national and international aspects of the dispute arising out of the Chicago Drainage Canal and its effect on the level of the Great Lakes in Canada, and the other on the question of the method by which the United States could join the League of Nations if it desired to do so. The terms of the Covenant of the League omitted to make provision for the case of a state which was a signatory of the Treaty of Versailles, but which failed to ratify the Treaty and then desired to join the League. Both Professor Eagleton's articles are very interesting.

Professor Salvioli writes on the jurisdiction of the Permanent Court of International Justice in disputes on matters of fact. The terms of Article 36 of the Statute make it clear that the Court is competent in such cases, but Professor Salvioli is troubled by the decision given by the Court in Judgment No. 20. His conclusion is that the Court is bound to exercise jurisdiction where states have concluded a special agreement, though cases falling within the rule laid down by the Court in that judgment must now be excluded. There is, however, an implied limitation that the issue involved is one falling within the sphere of international law.

An article by Dr. Raestad deals with the proposal submitted to the Assembly of the League by the Government of Finland for giving appellate jurisdiction to the Permanent Court of International Justice in cases where decisions of other international tribunals are challenged on the ground of "want of jurisdiction" or of *excès de pouvoir*. It is a subject in connexion with which too little attention is paid to the terms of the Statute of the Court. It is by no means clear that, so long as the existing Statute is in force, the Court can act as a court of appeal in any proper sense of that term.

Dr. Baak, of Amsterdam, is the author of an article on American International Law as opposed to Universal International Law. He formulates certain principles which he regards as distinctively American and traces the consequences which have resulted from them.

Dr. Pierre Wigny, of Harvard, concludes his study of Bills of Exchange in Private International Law, and the draft Geneva Conventions of 1930 and 1931. These articles constitute a very exhaustive study of the position.

Attention should also be called to the conditions of the John Westlake Prize which is to be competed for in the course of the next year. The subject for the essay is the rules determining the measure of damages in cases of international responsibility for injury to individuals in foreign territory.

C.

Zeitschrift für öffentliches Recht. Band XII, 1932.

Philosophical and theoretical discussions again occupy the greater part of the five numbers of this journal. Dr. Horváth and Dr. Meuzel deal with the legal philosophy of Hegel and Heraclitus; Dr. Sander outlines his own views, while Dr. Lacambra contributes a valuable investigation of the ontological basis of Kelsen's *Reine Rechtslehre*. Kelsen himself contributes a short monograph of

127 pages on international wrongs and their legal consequences ("Unrecht und Unrechtsfolge im Völkerrecht"), in which he elaborates his view that the only sanction of international law, that which gives it its legal character, is physical force, i.e. war and reprisals. In harmony with this view Dr. Moóv would reconcile the Kellogg Pact with the Covenant by attaching to the obligations of the former the sanctions of Article 16 ("Abänderung des Völkerbundsatzung und Probleme des Pazifismus"). Dr. Gross here crosses swords with Dr. Moóv, rejecting his attack on the logic of Pacifism, and would confine the operation of sanctions to the persons of the responsible ministers of a law-breaking state ("Der logische Widerspruch im Pazifismus und die Änderung der Völkerbundsatzung").

The Greenland question, now happily settled, is dealt with by Dr. Wolgast, and Dr. Kunz investigates with great thoroughness the theory of the present law of minority rights, in order, he says, to clear the ground for new and more satisfactory methods of dealing with that refractory but fundamental problem. Perhaps the most interesting article to the British reader is Dr. Meuzel's sketch of the historical development of the British Commonwealth of Nations, in which he comes to the conclusion that it is a Staatenbund of sovereign states in the form of a Real Union; so that the Crown is worn, it is true by one person, but in several different capacities. He rejects the view that the Empire must be at one in peace or war.

Among the many reviews which add so considerably to the usefulness of this journal, there is one of special interest. This is the review by Dr. Meuzel of *Gesellschaft, Staat und Recht*, a collection of essays dealing with Kelsen's Reine Rechtslehre, and presented to its author, the editor of this journal, on the occasion of his fiftieth birthday.

B. E. K.

Niemeyers Zeitschrift für Internationales Recht. Band XXXV und XXXVI. (Redaktions- und Verlagsbüro, Kiel, Kitzeberg 22).

Volume XXXV contains a very full and valuable article by Herr Verbeek, *Gerichtsreferendar* of Cologne, on the treaties and agreements for the execution of foreign judgments in civil cases—a matter in which the practice of states is sadly behind the necessities of contemporary life; also a shorter article by Professor Dochow of Heidelberg on International Administrative Law; among the documentation the full digests of German cases of international interest deserve attention. This volume completes the fortieth year of publication.

Volume XXXVI opens with a striking editorial note from Professor Niemeyer's pen, recalling the work of Ferdinand Böhm (1833–1901), the founder of the journal, and emphasizing the value of the positivist conception of international law and life and its contribution thereto. "Officials, lawyers, business men, politicians, and journalists, as well as men of learning, need guidance in the shape of the current publication, as complete and early as possible, of the material of treaties, laws, decrees, decisions, negotiations, legal opinions, and literary treatises." The volume also contains, in addition to abundant source-documents, in the spirit of the editorial note, articles by Spiropoulos on the attempts at union in the Balkans, by Schilling on the treatment of Russian pre-revolutionary legal relations by German courts, and by Schwarz on the international aspects of Hungarian decisions in matrimonial cases.

J. F. W.

Rivista di Diritto Internazionale, 1932. Roma: Società Editrice Athenaeum. (Yearly subscription, 80 lire.)

In the January and April numbers Dr. Baldoni contributes a long article, crammed with references and footnotes, on the question of the retrospective operation of the rules of Private International Law ("La successione nel tempo delle norme di diritto internazionale privato"). The author discusses the nature of these rules, which, according to him, belong to national and not to international law, and argues that the question under consideration must be determined according to the *lex fori*. The author examines in particular the cases of annexation and cession in relation to his subject.

In the July number Professor Cavaglieri contributes a very ingenious article on the "Legal position of unrecognized states". The author examines, closely and carefully, the doctrine which maintains that recognition is "declaratory", and, in the face of severe criticism by some of his colleagues, reaffirms the views he expressed ten years ago (*a*) that recognition of new states constitutes and creates international personality, and (*b*) that it is a unilateral and not a bilateral act. "Per quanto riguarda i caratteri del riconoscimento, sembra che la nostra opinione che esso sia costitutivo e unilaterale resista alle critiche che le sono state rivolte." The existence of a *de facto* state is, according to the author, a mere *prius* as regards international law. The position of a new state before recognition is "oggetto unicamente di vincoli giuridici tra gli altri Stati". Therefore, the question of *de iure* or *de facto* recognition does not arise. As to the unilateral nature of recognition, Professor Cavaglieri seems to be fortified in his view by Canning's famous dispatch of March 25, 1825, addressed to Spain.

In the last quarterly number Professor Diena criticizes Professor Cavaglieri's article, and by careful reasoning maintains the views he expressed as far back as 1908, when he argued without becoming a "jusnaturalist" that recognition cannot but be "declaratory" and a bilateral act.

The theory of creative efficacy is untenable. Although it is supported by great authority, yet I am inclined to agree with Sir John Fischer Williams ("Recognition", *Transactions of the Grotius Society*, Vol. XV, p. 61) who says that "the nature of things is in violent conflict with the whole conception of the creation of international personality by the declaration of the views of another state".

Professor Salvioli writes a skilful article on the question whether a divorce judgment obtained in a foreign country by two Italians, who have ceased to be Italian subjects, can be enforced in Italy, where the two Italian subjects were married, after the Concordat of 1929, according to the rites of the Church of Rome. Professor Salvioli's answer is in the negative. Notwithstanding his acutely reasoned argument, it is difficult to accept this view.

Mention may also be made of articles by Dr. Monaco on the "Natura della competenza dello Stato secondo il diritto internazionale"; by Dr. Sereni on "Il trattamento della nazione più favorita"; by Dr. Meucci on "La dilazione della guerra"; and also of an article by Professor Morelli on "Norme dispositive di diritto internazionale".

This volume includes some valuable notes on decisions of Italian courts involving points of international law, and of foreign courts relating to Italian interests.

GIUSEPPE M. PALLICCIA.

The Journal of Comparative Legislation and International Law, Vol. XIV, 1932.

The volume of the *Journal* for 1932 contains less international law than usual. Apart from an interesting paper by Dr. J. M. Spaight on "Self-Defence and International Air Power" and a few notes, the subject is ignored. This is not necessarily a bad thing. For the comparatively few international lawyers in England can say most of what they are anxious to express in the pages of the *British Year Book* and the American and continental journals. It is, too, definitely advantageous that one English journal should specialize in comparative law and in public law, the latter particularly, since it has close affiliations with international law and is very inadequately treated in most English journals. Professor Keith's "Notes on Imperial Constitutional Law" are among the permanent attractions of the *Journal*. Though his critics on the one side say that he is too legalistic and on the other side that he is not legalistic enough, they are always eager "to see what Keith says about it". Public law is also represented by the continuation of Professor Trotabas' treatise on "Damages in Administrative Law", by a paper by Sir Leslie Scott, K.C., on the "Evolution of Public Law", and by a short article on Bermuda by T. M. Dill and L. le M. Minty.

Comparative law justly receives a large share of the available space. Mr. Vesey-Fitzgerald's article on "The Franco-Italian Draft Code of Obligations, 1927" is an interesting exposition of an attempt to internationalize private law, though the author of the paper sees "no immediate prospect of action being taken" on the subject. Dr. Stallybrass continues his comparison between English Criminal Law and what is now the Italian Penal Code. German law receives just emphasis in articles by Dr. Rudolf Kahn, Dr. Richard Rosendorff, and Dr. E. Haskin. And Eastern law is given prominence through a lengthy review by Professor Jenks of the first volume of the English translation of the annotated edition of the Japanese Commercial Code, and an analysis by Mr. J. H. Teesdale of the new Chinese Company and Partnership Law.

W. I. J.

BIBLIOGRAPHY

(1932)

(In this Bibliography the following abbreviations are used: Acad. dip. int. = Académie diplomatique internationale; A.J.I.L. = American Journal of International Law; B.Y.B. = British Year Book of International Law; H.R. = Recueil des Cours, Académie de Droit International de La Haye; J.C.L. = Journal of Comparative Legislation and International Law; J.D.I. = Journal de Droit International; J.I.L.D. = Journal of International Law and Diplomacy; L.Q.R. = Law Quarterly Review; Niemeyers Z. = Niemeyers Zeitschrift für internationales Recht; Rev. de der. int. = Revista de derecho internacional; Rev. de dr. int. = Revue de droit international; Rev. de dr. int. et de lég. comp. = Revue de droit international et de législation comparée; Rev. de dr. int., de sci. dip. et pol. = Revue de droit international, de sciences diplomatiques et politiques; Rev. Gén. = Revue générale de droit international public; Riv. di dir. int. = Rivista di diritto internazionale; Z. f. aus. int. Privatrecht = Zeitschrift für ausländisches internationales Privatrecht; Z. f. aus. öff. R.u.V. = Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht; Z.f.V. = Zeitschrift für Völkerrecht.)

Air Law.

Ambrosini, A.: Per un sistema del diritto aeronautico. (Rivista di diritto aeronautico: 5–29.)

Cavaglieri, A.: A proposito della condizione giuridica degli aeroporti di alto mare. (Studi di dir. aeronautico 4: 19–25.)

Constantinoff, J.: Le droit aérien français et étranger: droit interne et international. Paris: Chauny & Quinsac. 342 pp. Fr. 40.

Hess, F.: Die rechtliche Ordnung des internationalen Luftverkehrs in der Schweiz. Zürich: Orell Füssli. iv+55 pp. Fr. Sw. 2.

Kroell, J.: La domanialité de l'air et sa police. (Rev. gén. de dr. aérien 1: 61–73.)

McNair, A. D.: The law of the air. London: Butterworth. xv+249 pp. 12*s*. 6*d*.

Maschino, M.: Les traités internationaux en matière de navigation aérienne. (J.D.I. 59: 569–88.)

Salvioli, G.: Gli isolotti galleggianti secondo il diritto internazionale. (Studi di dir. aeronautico 4: 26–31.)

Sandiford, R.: Le isole galleggianti. (Nuova antologia 67: 503–13.)

——: La neutralité aérienne. (Rev. gén. 39: 739–75.)

Savoia, C.: Nozioni di diritto penale aeronautico. (Studi di dir. aeronautico 4: 32–55.)

Schafer, H. U.: Die Flugelinsel: eine völkerrechtliche Studie über die Probleme der künstlichen Flugstutzpünkte auf offener See. Göttingen: Vanderhoeck & Ruprecht. 79 pp. Rm. 7.60.

Slotemaker, L. H.: Freedom of passage for international air services. Leiden: Sijthoff. iii+119 pp. Fl. 2.50.

Spaight, J. M.: An international air force. London: Gale & Polden. 123 pp. 5*s*.

——: Self-defence and international air power. (J.C.L. 14: 20–9.)

Arbitration, Conciliation, and Judicial Settlement.

Bellquist, E. C.: Finland's treaties for the peaceful settlement of international disputes. (A.J.I.L. 26: 70–86.)

Bosco, G.: La natura giuridica dell'arbitrato internazionale nella dottrina italiana. (Riv. di dir. int. 23: 490–507.)

Cory, H. M.: Compulsory arbitration of international disputes. London: Oxford Univ. Press. xiii+281 pp. 17*s*. 6*d*.

Efremoff, J.: Les traités de conciliation et l'évolution de la criminalité internationale. (Rev. de dr. int. 6: 226–43, tome 9.)

Falkmann, B.: L'arbitrage dans la Société des Nations. Paris: Pédone. Fr. 30.

Gallus: L'Acte général a-t-il une réelle utilité (Rev. de dr. int. 5: 377–424, 1931).

Garner, J. W.: The Senate reservations to the Inter-American general treaty of arbitration. (A.J.I.L. 26: 333–6.)

Gavrilović, S.: L'organisation des commissions de conciliation d'après les traités suisses. Paris: Recueil Sirey. 222 pp. Fr. 40.

Hart, H. L.: The Mixed Arbitral Tribunals: an experiment in legal procedure. London: Pitman. 2*s.*

Makowski, J.: L'organisation actuelle de l'arbitrage international. (H.R. 36: 267–384.)

Maurtua, V. M.: Revisión de las convenciones interamericanas de conciliación y arbitraje. (Rev. de der. int. 21: 327–80.)

Permanent Court of Arbitration. Traités généraux d'arbitrage communiqués au bureau international de la Cour. 5e série. La Haye: Nijhoff. xiii+327 pp. Fl. 6.

Vulcan, C.: La conciliation dans le droit international actuel. Paris: Pédone. Fr. 30.

Cheques.

Feller, A. H.: The international unification of laws concerning checks. (Harvard L.R. 45: 668–96.)

Helper: De internationale Checkretskonventioner af 1931. (Nordisk tidsskrift for international ret 3: Fasc. I, 3–31.)

Ravel: Zum internationalen Wechsel- und Scheckrecht. (Z. f. aus. int. Privatrecht 6: 324–41.)

Codification (General).

Maresh, C.: La codification du droit international. Paris: Pédone. Fr. 30.

Maurtua, V. M.: Un grave capítulo de la codificación americana del derecho internacional. (Rev. de der. int. 21: 209–326.)

Criminal Law.

IIIe Congrès International de droit pénal (Palerme, 1933). (Rev. int. de dr. pénal 9: 2–272, 312–62.)

Roux, J. A.: L'entr'aide des états dans la lutte contre la criminalité. (H.R. 36: 81–180.)

Servais, M. J., Pella, V., and Sasserath, S.: Troisième conférence internationale pour l'unification du droit pénal. Paris: Librairie des Juris-classeurs. 200 pp. Fr. 60.

Diplomatic and Consular.

Chevallier, J.-J.: Le droit de représentation diplomatique distincte des Dominions britanniques et de l'État Libre d'Irlande. (Rev. de dr. int. et de lég. comp. 59: 277–301.)

Diplomatic privileges and immunities. (A.J.I.L. 26: (Supplement) 15–187.)

Genet, R.: Traité de diplomatie et de droit diplomatique. T. 3, Les actes diplomatiques. Paris: Pédone. 611 pp. Fr. 120.

The legal position and functions of consuls. (A.J.I.L. 26: (Supplement) 189–449.)

Preuss, L.: Capacity for legation and the theoretical basis of diplomatic immunities. (Rev. de dr. int., de sci. dip. et pol. 10: 1–18.)

——: Les diplomates étrangers et les lois de prohibition. (Rev. de dr. int. et de lég. comp. 59: 184–202.)

Extradition.

Siew, L.: Der Auslieferungsvertrag zwischen Litauen und den Vereinigten Staaten von Amerika vom 9 April 1924: ein Beitrag zum positiven Auslieferungsrecht. Berlin: Schulz. iv+183 pp.

Finance.

Borchard, E. M.: International loans and international law. (Amer. Society of Int. Law, Proceedings, 26: 135–69.)

Cleeves, G., und Rautenberg, H.: Die Grundzüge von Steuer und Versicherung im internationalen Recht. (Vierteljahresschrift für Steuer- und Finanzrecht 6: 855–74.)

Fitz-Maurice, E.: Convention for the suppression of counterfeiting currency. (A.J.I.L. 26: 533–51.)

Herndon, J.: Relief from international income taxation: the development of international reciprocity for the prevention of double income taxation. Chicago: Callaghan. viii+303 pp. $5.

Kerschagl, R.: Die Devisengesetzgebung und Devisenbewirtschaftung in Südosteuropa. (Z. f. Ostrecht 6: 321–45.)

Mettgenberg, W.: Das Abkommen zur Bekämpfung der Falschmünzerei vom 20 April 1929. (Z. f. aus. öff. R.u.V. 3: 76–94.)

Poulteau, P.: Des successions dans le droit fiscal international. Successions des étrangers. Paris: Recueil Sirey. 186 pp. Fr. 30.

Sauser-Hall, G.: Les conventions germano-suisses sur les hypothèques avec clause d'or. (J.D.I. 59: 340–66.)

Schwarzenberger, G.: Die internationalen Banken für Zahlungsausgleich und Agrarkredite: Beitrag zum internationalen Finanzrecht. Berlin: Junker & Dünnhaupt. 101 pp. Rm. 4.

Foreigners.

Anzilotti, D.: Sui limiti della giurisdizione italiana sulle persone giuridiche straniere. (Riv. di dir. pubblico 24: 8–19.)

Lambie, M.: The foreign teacher: his legal status as shown in treaties and legislation with special reference to the U.S. New York: Institute of Education. 103 pp. 25 c.

Scerni, M.: Sulla giurisdizione internazionale in materia di stato fra stranieri. (Riv. italiana di dir. int. priv. 2: 35–46.)

Tan Shen-chi, B.: La condition juridique des étrangers et particulièrement des sociétés commerciales françaises en Chine. Paris: Recueil Sirey. 139 pp. Fr. 25.

Van Vleck, W. C.: Administrative control of aliens. London: Allen & Unwin. 269 pp. 15*s*.

Verdross, A.: Les règles internationales concernant le traitement des étrangers. (H.R. 37: 327–412.)

International Law.

Alexeiew, N. N., and Zaitseff, L.: Sowjetstaat und Völkerrecht. (Contd.) (Z. f. V. 16: 177–225.)

Alvarez, A., et Lapradelle, A. de: Les données fondamentales et les grands principes du droit international moderne. (Rev. de dr. int. 6: 82–141.)

Anderson, C. P., and Scott, J. B.: Advisory opinions from commissions of inquiry. (A.J.I.L. 26: 565–8.)

Baak, J. C.: Le droit international américain et le droit international universel. (Rev. de dr. int. et de lég. comp. 59: 307–97.)

Baldoni, C.: Gli organi e gli istituti nelle unioni internazionali. (Contd.) (Riv. di dir. int. 23: 464–89.)

——: La zona di Tangeri nel diritto internazionale e nel diritto marocchino. Padova: Cedam. 55 pp. L. 7.

Balladore Pallieri, G.: Die völkerrechtliche Rechtspersönlichkeit des Staates Città del Vaticano. (Z. f. öffentliches Recht 11: 505–25.)

Blondeau, A.: La subordination des Constitutions aux normes internationales. (Rev. de dr. int. 6: 579–616.)

Bosco, G.: Rapporti e conflitti fra giurisdizioni internazionali. Roma: Are. 148 pp. L. 15.

Bourquin, M.: Règles générales du droit de la paix. (H.R. 35: 5–232.)

Castberg, F.: L'excès de pouvoir dans la justice internationale. (H.R. 35: 357–472.)

Cavaglieri, A.: L'opera di Giorgio Washington e il diritto internazionale. (Riv. di dir. pubblico 24: 494–508.)

Chevallier, J.-J.: L'évolution du statut de Dominion. (Rev. gén. 39: 458–97.)

Delbez, L.: Du territoire dans ses rapports avec l'état. (Rev. gén. 39: 705–38.)

Drucker, P.: Die Rechtfertigung des Völkerrechts aus dem Staatswillen: eine logisch-kritische Untersuchung der Selbstverpflichtungs- und Vereinbarungslehre. Berlin: Vahlen. vi+60 pp. Rm. 2.50.

Dumbauld, E.: Interim measures of protection in international controversies. New York: Riemsdyck Bookservice. xii+204 pp. $3.

Eagleton, C.: International government. New York: Ronald Press. xx+672 pp. $4.

Fitzmaurice, G. G.: The meaning of the term "denial of justice". (B.Y.B. XIII: 93–114.)

Fontes Juris Gentium. (Institut für ausländisches öffentliches Recht und Völkerrecht.) Series B., sect. 1, t. 1, p. 1, fasc. 1. Répertoire de la correspondence diplomatique des états européens. Digest of the diplomatic correspondence of the European States, 1856–71. Berlin: Heymann. lxxii+432 pp. Rm. 35.

Garner, J. W.: Le développement et les tendances récentes du droit international. (H.R. 35: 611–720.)

Giannini, A.: Studi di diritto commerciale internazionale. Roma: Are. 155 pp. L. 12.

Gihl, T.: Lacunes du droit international. (Nordisk tidsskrift for international ret. (Acta scandinavica juris gentium) 3: 37–64.)

Gouet, Y.: La coutume en droit constitutionnel interne et en droit constitutionnel international. Paris: Pédone. 168 pp. Fr. 25.

Heydte, A. von der: Die Erscheinungsformen des zwischenstaatlichen Rechts; jus cogens und jus dispositivum im Völkerrecht. (Z. f. V. 16: 461–78.)

Higgins, A. P.: Institut de droit international, Cambridge, 1931. Inaugural address. (B.Y.B. XIII: 1–8.)

Hindmarsh, A. E.: Self-help in time of peace. (A.J.I.L. 26: 315–26.)

Hudson, M. O.: The Central American Court of Justice. (A.J.I.L. 26: 759–86.)

Internationale Statut Belgiens (Das). (Z. f. aus. öff. R.u.V. 3: 211–21.)

Keith, A. B.: Das Verhältnis des Statute of Westminster von 1931 zum internationalen Privatrecht. (Z. f. aus. u. int. Privatrecht 6: 301–9.)

Kelsen, H.: Unrecht und Unrechtsfolge im Völkerrecht. (Z. f. öffentliches Recht 12: 481–608.)

Ladyženskij, A. M.: Les tendances principales dans la vie internationale contemporaine et les deux idées fondamentales dans les doctrines de droit international. (Rev. int. de la théorie du droit 6: 23–40.)

Lais, R.: Die Rechtsfolgen völkerrechtlicher Delikte. Berlin: Stilke. 163 pp. Rm. 8.

Lauterpacht, H.: The nature of international law and general jurisprudence. (Economica 12: 301–20.)

Lavoie, P.: La Conférence impériale de 1930 et la politique des Dominions. (Rév. gén. 39: 776–828.)

Le Fur, L.: La Georgie et le droit des gens. Paris: Pédone. Fr. 10.

——: Précis de droit international public. 2e éd. Paris: Dalloz. 600 pp. Fr. 25.

Manchuria. J.I.L.D. 31 (special number).

Mannzen, K.: Sowjetunion und Völkerrecht: die Fragen der Anerkennung der Schulden, der Auslandspropaganda und des Aussenhandelsmonopols. Berlin: Stilke. 110 pp. Rm. 4.80.

Masters, R. D.: International law in national courts: a study of enforcement of international law in German, Swiss, French, and Belgian courts. New York: Columbia Univ. Press. 245 pp. $3.75.

Mirkine-Guetzevitch, B.: Droit international et droit constitutionnel. (H.R. 38: 311–463.)

Mokre, H.: Zur Theorie des Gewohnheitsrechts. (Z. f. öffentliches Recht 12: 386–451.)

Monaco, R.: Natura della competenza dello Stato secondo il diritto internazionale. (Riv. di dir. int. 24: 36–52.)

——: L'ordinamento internazionale in rapporto all'ordinamento statuale. Torino: Istituto giuridico della r. Università. 188 pp.

Moore, J. B.: International adjudications ancient and modern. Modern series, Vols. 3 & 4. London: Oxford Univ. Press. 12*s*. 6*d*. each.

Morelli, G.: Norme dispositive di diritto internazionale. (Riv. di dir. int. 24: 388–404.)

Ouang (Wang), R. H.: Essai sur le régime des capitulations en Chine. Paris: Recueil Sirey. iv+419 pp.

Peritch, J. M.: Droit international coutumier (non écrit). (J.I.L.D. 31.)

Plaisant, M.: De la protection internationale de la propriété industrielle. (H.R. 39: 357–549.)

Potter, P. B.: A manual digest of common international law. New York: Harper. xxi+284 pp. $2.50.

Reid, H. D.: International servitudes in law and practice. London: Cambridge Univ. Press. xxii+254 pp. 18*s.*

Richard, M.: Le droit de pétition. Paris: Recueil Sirey. 769 pp. Fr. 100.

Rousseau, C.: De la compatibilité des normes juridiques contradictoires dans l'ordre international. Paris: Pédone. 60 pp. Fr. 10.

Ruegger, P.: Völkerrecht und Wirtschaft. Zürich: Orell Füssli. 29 pp. Rm. 0.80.

Scelle, G.: Précis de droit des gens. 1re partie: Introduction. Le milieu intersocial. Paris: Recueil Sirey. 312 pp. Fr. 30.

Schlochauer, H. L.: Völkerrechtliche Dissertationen aus der Zeit von 1919 bis 1931. (Z. f. V. 16: 487–516.)

Seferiades, S.: La question du rapatriement des "marbres d'Elgin" considérée plus spécialement au point de vue du droit des gens. (Rev. de dr. int. 6: 52–81.)

Smith, H. A.: Great Britain and the law of nations. London: P. S. King. 416 pp. 16*s.*

Sprout, H. H.: Theories as to the applicability of international law in the federal courts of the United States. (A.J.I.L. 26: 280–95.)

Stael-Holstein, L. de: Quelques observations sur les servitudes internationales. (Acad. dip. int. 6: 105–12.)

Stenuit, R.: La radiophonie et le droit international public. Paris: Recueil Sirey. 200 pp. Fr. 40.

Taoka, R.: Status of the free city of Danzig in international law. (J.I.L.D. 31.)

Tenekides, C. F.: La protection internationale des intérêts privés. (Rev. de dr. int. et de lég. comp. 59: 89–111.)

Toledano, A. D.: Considérations juridiques en marge du problème du désarmement. (Rev. int. de la théorie du droit 6: 224–42.)

Travers, M.: Le droit commercial international. T. 5, Fasc. 1. Paris: Recueil Sirey. 613 pp. Fr. 60.

Tsatsos, K.: Der juristische Pragmatismus in der Völkerrechtslehre. (Z. f. öffentliches Recht 12: 35–51.)

Vollenhoven, C. von: Du droit de paix. La Haye: Nijhoff. xii+251 pp. French Fr. 80.

Wehberg, H.: La contribution des conférences de paix de La Haye au progrès du droit international. (H.R. 37: 533–667.)

Williams, J. F.: International change and international peace. London: Milford. vi+79 pp.

——: Justiciable and other disputes. (A.J.I.L. 26: 31–6.)

——: A legal footnote to the story of German reparations. (B.Y.B. XIII: 9–38.)

Wolff, K.: Les principes généraux du droit applicables dans les rapports internationaux. (H.R. 36: 483–550.)

International Waterways.

Bacon, R. E.: British and American policy and the right of fluvial navigation. (B.Y.B. XIII: 76–92.)

Blondeau, A.: L'Escaut, fleuve international, et le conflit hollando-belge. Paris: Recueil Sirey. 39 pp. Fr. 6.

Eagleton, C.: Le canal de drainage de Chicago et autres détournements de cours d'eau aux États-Unis. (Rev. de dr. int. et de lég. comp. 59: 398–409.)

Gidel, G.: Condition dans les eaux intérieures étrangères des navires d'État affectés en totalité ou en partie à un service commercial. (Rev. de dr. int. et de lég. comp. 59: 34–70.)

Radovanovitch, V. M.: Le Danube maritime et le règlement du différend relatif aux compétences de la Commission Européenne sur le secteur Galatz–Braila. Paris: Pédone. Fr. 20.

Volz, J.: Die Frage der Internationalisierung der Weichsel. Danzig: Danziger Verlagsgesellschaft. 78 pp. Rm. 2.50.

Winiarski, B.: Où en est actuellement le droit fluvial international? (Affaires étrangères 2: 597–612.)

League of Nations.

Boisson, H.: La Société des Nations et les bureaux internationaux des unions universelles postale et télégraphique. Paris: Pédone. 152 pp. Fr. 30.

Del Vecchio, G.: La Société des Nations au point de vue de la philosophie du droit international. (H.R. 38: 545–647.)

Kunz, J. L.: L'article 11 du pacte de la Société des Nations. (H.R. 39: 683–790.)

Kutscher, E.: Abrüstung und Völkerbund. Göttingen: Vandenhoeck & Ruprecht. 120 pp. Rm. 4.50.

Leroy, M.: La Société des Nations: guerre ou paix. Paris: Pédone. 240 pp. Fr. 20.

Maim, N.: Völkerbund und Staat: ein Beitrag zur Ausarbeitung eines allgemeinen öffentlichen Rechts. Leipzig: Koehler & Volckmar. 356 pp. Rm. 12.

Morley, F.: The Society of Nations. London: Faber. xxii+678 pp. 18*s*.

Post, H. H.: La Société des Nations et l'abbé de Saint Pierre. Amsterdam: De Spieghel. 200 pp. Fl. 3.90.

Rauchberg, H.: Les obligations juridiques des membres de la Société des Nations pour le maintien de la paix. (H.R. 37: 87–204.)

Ray, J.: La politique et la jurisprudence de la Société des Nations du début de 1931 au début de 1932. (2e supplément au Commentaire du Pacte.) Paris: Recueil Sirey. 117 pp. Fr. 15.

Rutgers, V. H.: La mise en harmonie du Pacte de la Société des Nations avec le pacte de Paris. (H.R. 38: 5–121.)

Schröder, M.: Die Grundbuchfähigkeit des Völkerbundes. Berlin: Rothschild. xiv+84 pp. Rm. 4.40.

Walp, P. K.: Constitutional development of the League of Nations. Lexington: University of Kentucky. vii+183 pp. $2.

Weinberg, B.: Völkerbund und Nichtmitgliedstaaten. Münster: Heliosverlag. 106 pp. Rm. 2.75.

Wigniolle, A.: La Société des Nations et la révision des traités. Paris: Rousseau. 324 pp. Fr. 40.

Zeinedinne: Le régime du contrôle de la Société des Nations. Paris: Presses Universitaires. Fr. 60.

Mandates.

Ambrosini, G.: Nazionalità degli abitanti dei territori sotto mandato. (Riv. di dir. pubblico 24: 135–44.)

Bentwich, N.: The termination of the A mandates. (Z. f. V. 3 (Abhandlungen): 176–91.)

Evans, L. H.: The general principles governing the termination of a mandate. (A.J.I.L. 26: 735–58.)

Pelichet, E. L.: La personnalité internationale distincte des collectivités sous mandat. Paris: Rousseau. vi+174 pp.

Rousseau, C.: La cessation du mandat international. (Revue politique et parlementaire 39: 65–81.)

Maritime Law.

Création d'un office international des eaux. (Annuaire de l'Institut de droit international: Vol. 1, 6–24, 1931.)

Draft convention and comment on piracy, prepared by the Research in International Law at Harvard Law School, with a collection of piracy laws of various countries. (Supplement to A.J.I.L. 26: 743–1013.)

Fawkes, G. B. H.: The submarine and international law. (Journal of the Royal United Service Institution 77: 744–73.)

GIDEL, G.: Le droit international public de la mer. 2 T. Paris: Recueil Sirey. Fr. 205.

VERNETTI, A.: Il regime dei mari interni, degli stretti e dei bracci di mare nel diritto marittimo. (Diritto marittimo 34: 136–44.)

Marriage.

CUTTAT, J. A.: De l'influence des régimes matrimoniaux sur la poursuite dirigée contre la femme mariée. (Abhandlungen zum schweizerischen Recht, N.F., Heft 77). Bern: Stämpfli. x+216 pp. Rm. 7.

EHERECHT (Das) der europäischen Staaten und ihrer Kolonien. 2. Auflage, Teil 1. (Die Rechtsverfolgung im internationalen Verkehr. Bd. 4, Teil 1, Lieferung 1.) Berlin: Heymann. xv+376 pp. Rm. 30.

Minorities.

AMOS, H. E.: Staatssouveränität und Minderheitenrecht. Berlin: Stilke. 148 pp. Rm. 5.50.

CAMERER, R.: Verbesserung des Minderheitenschutzes gegen den Willen der betroffenen Staaten? (Völkerrechtsfragen, H. 37). Berlin: Dümmler. 64 pp. Rm. 4.

KUNZ, J. L.: Prolegomena zu einer allgemeinen Theorie des internationalen Rechtes nationaler Minderheiten. (Z. f. öffentliches Recht 12: 221–72.)

MANDELSTAM, A.: Protection des minorités (Annuaire de l'Institut de droit international: Vol. I, 514–66. 1931.)

——: La protection internationale des droits de l'homme. (H.R. 38: 129–232.)

REDSLOB, R.: Le principe des nationalités. (H.R. 37: 6–82.)

STONE, J.: International guarantees of minority rights: procedure of the Council of the League of Nations in theory and practice. London: Oxford Univ. Press. 302 pp. 14*s*.

Most-Favoured-Nation Treatment.

NOLDE, BARON B.: La Clause de la nation la plus favorisée et les tarifs préférentiels. (H.R. 39: 5–130.)

SERENI, A. P.: Il trattamento della nazione più favorita. (Riv. di dir. int. 24: 53–82, 405–27.)

Nationality.

ANCEL, M.: L'action en reconnaissance de nationalité. (Rev. de dr. int. 27: 432–50.)

COLANERI, A.: De la condition des "Sans Patrie". Paris: Librarie gén. de droit et de jurisprudence. Fr. 35.

DI PAULI: La question des apatrides et plus particulièrement en Europe centrale. (Acad. dip. int. 6: 9–19.)

ENGLANDER, H.: Die Staatlosen. Wien: Manz. 29 pp. Sch. 2.

HOVER, E. J.: Citizenship of women in the United States. (A.J.I.L. 26: 700–19.)

LESSING, H.: Das Problem der Staatenlosigkeit ehemaliger Elsass-Lothringer. Stuttgart: Ausland und Heimat Verlag. xi+86 pp. Rm. 2.60.

LE PROBLÈME de la nationalité dans le programme du second recensement de la population de la République polonaise. (Questions minoritaires 4: 1–30.)

SANDBERGEN, F. J. W. H.: Nederlandsche en Nederlandsch-Indische scheepsnationaliteit. Leiden: Sitjhoff. vi+310 pp. Fl. 6.

SCOTT, J. B.: Declaración sobre nacionalidad. (Rev. de der. int. 11: 21–83.)

STEIGER, W.: Die Staatsangehörigkeit der Handelsgesellschaften. Zürich: Orell Füssli. 39 pp. Rm. 1.20.

VIDOR, L.: Die Staatsangehörigkeit der Ehefrau nach schweizerischem Recht. (Diss., Zürich) Affoltern: Weiss. xiv+107 pp.

Outlawry of War.

FENWICK, C. G.: "The implication of consultation" in the Pact of Paris. (A.J.I.L. 26: 787–9.)

MEUCCI, C.: La dilazione della guerra. (Riv. di dir. int. 24: 82–98.)

Permanent Court of International Justice.

Beckett, W. E.: Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de justice internationale. (H.R. 39: 135–272.)

Bilfinger, C.: Der Streit um die deutsch-österreichische Zollunion. (Z. f. V. 3 (Abhandlungen): 163–75.)

Blanco, C.: La validez de las sentencias arbitrales y el Tribunal Permanente de Justicia Internacional. (Rev. de der. int. 11: 50–70.)

Caballero de Bedoya, R. V.: État actuel de la question de la Cour Permanente de Justice Internationale considérée comme instance de recours. (Rev. de dr. int. 6: 142–67.)

——: La Cour Permanente de Justice Internationale comme instance de recours. (Acad. dip. int. 6: 35–45.)

Caloyanni, M. A.: L'organisation de la Cour Permanente de Justice et son avenir. (H.R. 38: 655–786.)

Castberg, F.: Internasjonale domstolers overskridelse av sin kompetanse. (Nordisk tidsskrift for international ret 3: 32–52, 81–102.)

Fachiri, A. P.: The Austro-German customs union case. (B.Y.B. XIII: 68–75.)

Friede, W.: Die Intervention im Verfahren vor dem Ständigen Internationalen Gerichtshof. (Z. f. aus. öff. R. u. V. 3: 1–67.)

Kaufmann, E.: Probleme der internationalen Gerichtsbarkeit. Leipzig: Teubner. 22 pp. Rm. 1.

Lessing, H. W.: Die Gutachten des Ständigen Internationalen Gerichtshofes. Berlin: Rothschild. 107 pp. Rm. 4.80.

Niemeyer, H.: Einstweilige Verfügungen des Weltgerichtshofs: ihr Wesen und ihre Grenzen. Leipzig: Noske. 108 pp. Rm. 5.

Nolde, B.: Le problème international de l'union douanière austro-allemande. (Rev. gén. 39: 261–359.)

Preuss, L.: The dispute between Denmark and Norway over the Sovereignty of East Greenland. (A.J.I.L. 26: 469–87.)

Raestad, A.: Le recours à la Cour Permanente de Justice Internationale contre les sentences des Tribunaux d'arbitrage internationaux pour cause d'incompétence ou d'excès de pouvoir. (Rev. de dr. int. et de lég. comp. 59: 302–25.)

Rebbe, W.: Der Lotusfall vor dem Weltgerichtshof. Leipzig: Noske. xiv+119 pp. Rm. 5.

Tremaud, H.: La solution judiciaire du procès des zones franches. (Rev. politique et parlementaire 39: 491–509.)

Vali, F.: Die deutsch-österreichische Zollunion vor dem Ständigen Internationalen Gerichtshof. Wien: Manz. vii+149 pp. Rm. 7.20.

Private International Law.

Audinet, E.: Le droit international privé dans le projet de réforme du Code civil italien. (J.D.I. 59: 323–39.)

Bartin, E.: Principes de droit international privé. Paris: Domat-Montchrestien. 2 vols. Fr. 65.

Bernard, A.: L'exécution des sentences arbitrales étrangères en Belgique et en France. (Institut belge de dr. comp. Revue trimestrielle 18: 139–57.)

Bustamante, A. S. de: Les principes fondamentaux du droit international privé dans la législation cubaine. (Rev. de dr. int. privé 27: 30–46.)

Colombos, C. J.: La conception du droit international privé d'après la doctrine et la pratique britanniques. (H.R. 36: 5–76.)

Diena, G.: La funzione delle norme di diritto internazionale privato e il compito dell'autorità giudiziara. (Riv. italiana di dir. int. priv. 2: 329–46.)

Draft Convention and comment on competence of courts in regard to foreign states, prepared by the Research in International Law of the Harvard Law School. (A.J.I.L. (supplement) 26: 455–738.)

Eckstein, F. L.: Geldschuld und Geldwert im materiellen und internationalen Privatrecht. Berlin: Vahlen. ix+132 pp. Rm. 6.

Escarra, J.: La codification du droit de la famille et du droit des successions. Paris: Pédone. 100 pp. Fr. 40.

Fenichel, S.: Das polnische internationale Prozessrecht nach der neuen Zivilprozessordnung. (Z. f. Ostrecht 6: 401–27.)

Frankenstein, E.: Une doctrine moderne du droit international privé. (Rev. de dr. int. privé 27: 47–73.)

Gutteridge, H. C.: Reciprocity in regard to foreign judgments. (B.Y.B. XIII: 49–67.)

Hesse: Die privatrechtliche Gesetzgebung im Memelgebiet seit dem Jahre 1927. (Z. f. aus. int. Privatrecht 6: 659–75.)

Lepointe, G., et Petchorine, D.: L'évolution de la jurisprudence anglaise concernant les sociétés russes nationalisées. (J.D.I. 59: 853–66.)

Levy-Ullmann, H.: Rapports du droit international privé avec le droit comparé. (Bulletin mensuel de la Société de lég. comp. 61: 205–20.)

Lirebours-Pigeonniere, P.: Précis de droit international privé. 2e. éd. Paris: Dalloz. 450 pp. Fr. 25.

Lorenzen, E. G.: Cases on the conflict of laws, selected from decisions of English and American courts. 3rd ed. St. Paul: West Publishing Co. 1148 pp. $6.

——: Exécution aux États-Unis des jugements étrangers condamnant au paiement de sommes d'argent. (Rev. de dr. int. privé 27: 228–53.)

Makarov, A. N.: Conception du droit international privé d'après la doctrine et la pratique russes (U.R.S.S.). (H.R. 35: 477–604.)

——: Précis de droit international privé d'après la législation et la doctrine russes. Paris: Giard. 471 pp. Fr. 60.

Maurach, R.: Das internationale Zivilprozessrecht der Sowjetunion. (Niemeyers Z. 47: 1–48.)

Mercier, A.: Le conflit des lois pénales en matière de compétence. (Rev. de dr. int. et de lég. comp. 58: 439–90.)

Meriggi, L.: Saggio critico sulle qualificazioni. (Riv. italiana di dir. int. privato e processuale 2: 189–308.)

Messinesi, P.: La contre-bande en droit international privé. Fr. 25.

Munch-Petersen, H.: Une question relative à l'universalité de la faillite. (Nordisk tidsskrift for international ret (Acta scandinavica juris gentium) 3: 65–74.)

Neuner, R. R.: Der Sinn der international-privatrechtlichen Norm: eine Kritik der Qualifikationstheorie. Wien: Rohrer. 135 pp. Rm. 5.

Nussbaum, A.: Deutsches internationales Privatrecht, unter besonderer Berücksichtigung des österreichischen und schweizerischen Rechts. Tübingen: Mohr. xx+539 pp. Rm. 24.20.

Pontes de Miranda, F. C.: La conception du droit international privé d'après la doctrine et la pratique au Brésil. (H.R. 39: 555–677.)

Rabel, E.: Internationale Quellensammlung. (Z. f. aus. int. Privatrecht 6: 1–9, Sonderheft 1932.)

Sperl, H.: La reconnaissance et l'exécution des jugements étrangers. (H.R. 36: 389–478.)

Spindler, J. von: Wanderungen gewerblicher Körperschaften von Staat zu Staat als Problem des internen und internationalen Privatrechts. Berlin: Heymann. vi+90 pp. Rm. 5.

Szaszy, E. de: Le droit international privé hongrois. (Acta juris hungarici 1: 106–20.)

Tenekides, C.-G.: La loi étrangère et le droit hellénique. (J.D.I. 59: 589–605.)

Tiran, A.: Les successions testamentaires en droit international privé. Paris: Recueil Sirey. 179 pp. Fr. 28.

Trias de Bes, J. M.: Derecho internacional privado. Sistema del derecho español positivo. Barcelona: Bosch. 152 pp. Ptas. 10.

Valery, J.: Observations sur les dispositions contenues dans le projet de réforme du Code civil italien qui intéressent le droit international privé. (Rev. de dr. int. privé 27: 213–27.)

Valladao, H.: Le droit uniforme et le droit international privé. (J.D.I. 59: 877–97.)

Vos, L. de: Études sur les conflits de qualification en droit international privé (contd.). (Institut belge de dr. comp., revue trimestrielle 17: 169–208, 18: 213–54.)

Wigny, P.: Les effets de commerce en droit international privé et les projets de convention de Genève (1930–1). (Contd.) (Rev. de dr. int. et de lég. comp. 59: 410–28.)

Worms, A. E.: Zum interterritorialen Privatrechte der UdSSR. (Z. f. Ostrecht 6: 700–17.)

Recognition.

Borchard, E. M.: The unrecognized government in American courts. (A.J.I.L. 26: 261–71.)

Bushe-Fox, P. L.: Unrecognized states: cases in the Admiralty and Common Law Courts, 1805–26. (B.Y.B. XIII: 39–48.)

Brown, M.: La reconnaissance des nouveaux états et des nouveaux gouvernements. (Rev. de dr. int. et de lég. comp. 59: 5–33.)

Cavaglieri, A.: La situazione giuridica dello Stato non riconosciuto. (Riv. di dir. int. 24: 305–45.)

Reconnaissance, détermination et signification en droit international du domaine laissé par ce dernier à la compétence exclusive de l'État. (Annuaire de l'Institut de droit international: Vol. 1, 1931, 25–86.)

Stille, H. E.: Die Rechtsstellung der de-facto Regierung in der englischen und amerikanischen Rechtssprechung. Berlin: Rothschild. 108 pp. Rm. 4.80.

Sovereignty.

Arbitral award on the subject of the difference relative to the sovereignty over Clipperton Island. (A.J.I.L. 26: 390–4.)

Baumgarten, A.: Souveränität und Völkerrecht. (Z. f. V. 3 (Abhandlungen): 192–207.)

The Clipperton Island case, France v. Mexico. (Cumulative digest of international law and relations 2: 94–8.)

Frey, J.: Die Gebietshoheit im schweizerischen Staatsrecht und im Völkerrecht. (Zürich, Diss.) Lachen: Buchdruckerei Gutenberg. 156 pp.

Jaeger, F.: Le problème de la souveraineté dans la doctrine de Kelsen. Paris: Boccard. 170 pp. Fr. 18.

Jascenko, A.: Der Souveränitätsbegriff im Zusammenhang mit der Definition des Staates und der Staatenverbindungen. (Nordisk tidsskrift for international ret (Acta scandinavica juris gentium) 3: 3–27.)

Le Fur, L.: La souveraineté de l'état et ses limites nécessaires. (Politique 6: 289–309.)

Piccioni, C.: Les territoires autonomes crées après la grande guerre. (Rev. d'histoire diplomatique 46: 49–62.)

State Responsibility.

Dumas, J.: La responsabilité des états à raison des crimes et délits commis sur leur territoire au préjudice des étrangers. (H.R. 36: 187–261.)

Durand, C.: La responsabilité internationale des états pour déni de justice. (Rev. gén. 38: 694–748.)

Territorial Waters.

Kalijarvi, T.: Scandinavian claims to jurisdiction over territorial waters. (A.J.I.L. 26: 57–69.)

Treaties.

Chailley, P.: La nature juridique des traités internationaux selon le droit contemporain. Paris: Recueil Sirey. 343 pp. Fr. 50.

Enforcement of treaty obligations. (Amer. Society of Int. Law, Proceedings 26: 90–134.)

Genet, R.: La clause tacite de ratification. (Rev. gén. 38: 749–69.)

Hudson, M. O.: Languages used in treaties. (A.J.I.L. 26: 368–72.)

Kraemer, F.: Das Verhältnis der französischen Bündnisverträge zum Völkerbundpakt und zum Pakt von Locarno. Leipzig: Noske. xviii + 134 pp. Rm. 6.

Kunz, J. L.: Die Revision der Pariser Friedensverträge: eine völkerrechtliche Untersuchung. Wien: Springer. ix + 328 pp. Rm. 34.

Leibholz, G.: Der Abschluss und die Transformation von Staatsverträgen in Italien. (Z. f. V. 16: 353–76.)

Lemonon, E.: Un traité diplomatique peut-il engager la responsabilité de l'état? (Rev. de dr. int. privé 26: 657–67.)

McClendon, R. E.: The two-thirds rule in Senate action upon treaties, 1789–1901. (A.J.I.L. 26: 37–56.)

Mestre, A.: Les traités et le droit interne. (H.R. 38: 237–306).

Morellet, J.: La notion de réciprocité dans les traités de travail et les conventions internationales du travail. (Rev. de dr. int. privé 26: 642–56.)

Nature and interpretation of treaties. (Amer. Society of Int. Law, Proceedings 26: 45–62.)

Rinaldi, R.: La revisione dei trattati secondo il patto delle Società della Nazioni. Roma: Albrighti, Segati. 112 pp. L. 7.

Schade, H.: Ersatz der Zustimmung des Reichstags zu Staatsverträgen im Wege des Art. 48 RV. (Archiv des öffentlichen Rechts 21: 364–84.)

Schmitz, E.: Die Methode des Abschlusses internationaler Verträge. (Z. f. aus. int. Privatrecht 6: 221–93, Sonderheft 1932.)

——: Die Methode des Abschlusses internationaler Verträge nach deutschem Recht. (Z. f. V. (Abhandlungen) 3: 313–85.)

Taube, M. de: L'inviolabilité des traités dans l'histoire de la diplomatie et du droit international. (Acad. dip. int. 6: 3–9.)

Die völkerrechtliche Stellung der Niederlande im Falle eines Krieges. (Z. f. aus. öff. R.u.V. 3: 200–11.)

Wild, P. S.: Treaty sanctions. (A.J.I.L. 26: 488–501.)

Winkler, C. H.: Verträge zu Gunsten Dritter im Völkerrecht. Leipzig: Noske. xiv+124 pp. Rm. 5.

Wou, P.: Histoire diplomatique de la Chine depuis 1919. La révision des traités sino-étrangers. Paris: Rousseau. 334 pp. Fr. 60.

War.

Blum, R.: Das System der verbotenen und erlaubten Kriege im Völkerbundsatzung, Locarno-Verträgen und Kellogg-Pakt. Leipzig: Noske. viii+44 pp. Rm. 2.50.

Brierly, J. L.: International law and resort to armed force. (Cambridge L. J. 4: 308–19.)

Gramsch, W.: Deutschlands Verträge gegen den Krieg. Berlin: Stilke. 162 pp. Rm. 3.

Haase, J.: Wandlung des Neutralitätsbegriffes. Leipzig: Noske. xviii+209 pp. Rm. 7.

Hilleke, H.: Der Kriegsbegriff und seine Stellung in der Weltordnung: eine völkerrechtliche Untersuchung. Leipzig: Noske. vi+81 pp. Rm. 2.

Martin, C. E.: The legal position of war and neutrality during the last twenty-five years. (Amer. Society of Int. Law, Proceedings of 25th annual meeting: 137–79.)

Martini, P. A.: Blockade im Weltkrieg. Berlin: Dümmler. 146 pp. Rm. 7.

Matsubara, K.: Self-defence and reprisals. (J.I.L.D.) Japanese text.

Nichols, A.: Neutralität und amerikanische Waffenausfuhr, insbesondere in Bezug auf den Pakt von Paris. Berlin: Ebering. 145 pp. Rm. 4.80.

Rappaport, E. S.: Propagande de la guerre d'agression comme délit du droit des gens. Paris: Recueil Sirey. 33 pp. Fr. 7.

Serwischer, P.: Kriegsschuldfrage und Kriegsverhütungsrecht. Berlin: Ebering. 150 pp. Rm. 6.

Vigness, P. G.: Neutrality of Norway in the World War. London: Oxford Univ. Press. 188 pp. 9*s*.

Wehrer, A.: La politique de sécurité et d'arbitrage du Grand-Duché de Luxembourg—sa politique de neutralité. (Rev. de dr. int. et de lég. comp. 59: 326–66.)

Wrede, R. A.: Alandsöarnas ställning i folkrättsligt hänseende. (Nordisk tidsskrift for international ret 3: 103–21.)

Wright, Q.: When does war exist? (A.J.I.L. 26 :363–8.)

INDEX

Administrator of Austrian property v. *Russian Bank for Foreign Trade*, case of, 202, 203
Albania and Yugoslavia: Commission of Inquiry, action and procedure of Council regarding, 28
Amendment and revision contrasted, 46 n.
Anglo-Persian oil dispute, 148
Assicurazioni Generali v. *Selim Cotron*, case of, 193
Austria and Hungary, frontier controversy between, before the Council of the League, 23

Banque Internationale de Commerce de Petrograd v. *Goukasson* (1925), case of, 183 n.
Bartin v. *République Hellénique*, case of, 101, 102
Belgenland, case of, 152
Bentwich, Norman, The end of the capitulatory system, 89–100
Bergverksaktiebolaget Kosmai v. *Militar-Liquidierungsamt of Vienna*, case of, 114.
Berlin Conference (1884–5), and recognition of newly-acquired territory, 66, 67
Bibliography, 232–42
Bills of Exchange, draft uniform laws of, 77
Blackmer v. *United States* (1932), case of, 151, 152
Boldrini v. *Boldrini* (1932), case of, 196, 197
Bona vacantia, property of a dissolved company as, 9, 10, 15, 16
Borg v. *Caisse Nationale d'Epargne Française*, case of, 113
Bosnia and Herzegovina, annexation of, British protest against, 70
Boycott in international relations (H. Lauterpacht), 125–40
Brazil, withdrawal of from League, discussions on, 29, 30
British Commonwealth of Nations: settlement of disputes, 146
Buerger and Another v. *New York Life Assurance Co* (1927), case of, 5
Bulgaria, French claim to capitulatory privileges in, 97
Bulgarian independence, proclamation of, British protest, 70
—— refugees loan (1926), interested states present at discussions on, 26

Canada Malting Co. Ltd. v. *Patterson Steamships Ltd.* (1932), case of, 152
Canadian cases, 148–50
Capitulatory system, The end of the (Norman Bentwich), 89–100
Caratheodory v. *The French State*, case of, 115
Carriage by rail, unification of law of, 77
China, practice of boycotting in, 126, 127
Coale v. *Société Co-opérative Suisse des Charbons*, case of, 110, 111
Codification of rules of private international law, attempts at, 75, 76
Commercial treaties, recognition or non-recognition in relation to, 72
—— —— in relation to responsibility for boycott, 130, 131
"Consideration" of matters before Council of League, 28
Contiguous zone, doctrine of, and the dicta in *Croft* v. *Dunphy*, 155–7
Cook v. *The United States* (1933), case of, 150
Corea, annexation of, Japan's undertakings as to, 70, 71
Croft v. *Dunphy*, case of, 149, 150, 155–7, 191, 192

De Tchihatchef v. *Salerni Coupling Ltd.* (1932), case of, 12
"Decisions" within Art. 5, para. 1, definition of, 35–7
Diplomatic protection, recognition and non-recognition as affecting, 72, 73
Duff Development Company v. *The Government of Kelantan*, case of, 105, 106, 107

Egypt, boycotting of British goods in, 126
——, capitulations in, 93–6
——, Mixed Courts in, success of, 94
Employers' Liability Corporation v. *Sedgwick Collins* (1927), case of, 4
English Courts, decisions on points of international law during 1932, 183–203
Equality of Treatment (Accidents) Convention (1925), revision of, difficulties involved in, 58
Exterritoriality and the capitulatory system, 90
Extradition, the Insull case, 150
—— treaties, recognition and non-recognition in relation to, 72

First Russian Insurance Co. v. *London & Lancashire Insurance*, 5
Fitzmaurice, G. G., State immunity & proceedings in foreign courts, 101–24.

Foreign corporations, dissolution of, in private international law, 1 *et seq.*
Free Zones of Upper Savoy, case of, 160–5
French Government v. *Serra*, case of, 116
—— *Republic* v. *Inland Navigation Co.*, case of, 110
—— *Shares* case, 112

Grant v. *Grant*, case of, 197
Greco-Bulgarian dispute (1925), action and procedure of Council of League in, 29
Greco-Italian dispute (1923), action and proceedings of Council of League in, 28, 29
Greenland case, the, 146, 147, 148, 166, 167, 174–80
Grotius Society, annual meeting of, 158, 159
Gutteridge, H. C., An international code of the law of sale, 75–88

Halig v. *The Polish State*, case of, 111
Hospital ships, persons and things which may be carried on, 141–3
Hours of Work (Coal Mines) Convention (1931), stipulated revision of, 56, 57

Immunity from proceedings in foreign courts, State (G. G. Fitzmaurice), 101–24
Institute for the Unification of Private Law, of Rome, 81 *et seq.*
Insull case, the, 150, 151
"Interests" of a state defined, 24, 25
—— ——: when are they "specially affected", 25, 26
International Labour Conventions, legal nature of, 49 *et seq.*
—— —— ——, revision of (C. Wilfred Jenks), 43–64
—— —— Organization and the "Committee of Experts on Article 408" of Versailles Treaty, 143–5
—— Law Association, Conference of, 158
—— ——, Institute of, meeting of, 157
—— responsibility of a state in regard to boycotting, 127, 134
—— tribunals, decisions, opinions, and awards of, 160–82.
Interpellation, Continental law of, 86, 87
Intervention in proceedings before Permanent Court, right of, 24
Iraq, mandate for, in relation to administration of justice in case of foreigners, 98, 99
Italian Government, responsibility of, in relation to Fascist party, 133

Japan and the annexation of Corea, 70, 71
Jenks, C. Wilfred, Revision of International Labour Conventions, 43–64
Jupiter, case of the (1927), 4, 185

Kellogg Pact in relation to refusal of recognition, 68, 73
Kronprins Adolf arbitration, 180
Kuomintang, responsibility of Chinese Government in relation to, 133

Labour Conventions, Revision of International (C. Wilfred Jenks), 43–64
Lakhowski v. *The Swiss Federal Government and Colonel de Reynier*, case of, 114
Lauterpacht, H., Boycott in international relations, 125–40
Lazard Bros. & Co. v. *Banque Industrielle de Moscou*, case of, 6
Lazard Bros. & Co. v. *Midland Bank Ltd.*, case of, 2 n., 3 n., 6, 186, 187
Le Louis (1817), case of, 158
League of Nations and the rule of unanimity, 18 *et seq.*
—— —— —— Sino-Japanese dispute, 19 n., 23, 33, 40, 41, 65
Liquidation of English assets of Russian corporations, method of, 7, 8
Liquidator of English branch of foreign corporation, obligations of, 12, 13
Lytton Commission of League of Nations and boycotting, 125, 134, 135, 136

McNair, Arnold D., the Stimson doctrine of non-recognition, 65–74
Manufacturing Company I.A. Wormin Luetchg and Cheshire Ltd. and Cheshire v. *Frederick Huth & Co.* (1928), case of, 5
Maritime law, progress towards unification of, 76, 77
Matsuyama and Sano v. *The Republic of China* (1928), case of, 109, 110
"Matters of procedure" within Art. 5, para. 2, definition of, 38–41
Memel case, the, 148, 165, 166, 167–71
Merchants' Guilds in China, 126
Minimum Age (Non-Industrial Employment) Convention (1931), special treatment clause in, 60
Minorities questions, action and procedure of League in dealing with, 27, 28

Narcotic drugs, Convention for limiting manufacture of, &c., 153–5
National Navigation Co. of Egypt v. *Tavoularidis*, case of, 113
National tribunals, decisions of, involving points of international law, 183–203
Night Work (Women) Convention (1919), attempted revision of, 54, 55
—— ——, interpretation of, 171–3

Nobili v. *The Emperor Charles I of Austria*, case of, 117
Non-recognition, Stimson doctrine of (A. D. McNair), 65–74

Oil pipe-line and the Mandates, 145, 146
Optional clause, decisions under, 147, 148

Palestine, provisions of Mandate as regards Capitulations, 97
Panama, recognition of, by United States, 69
Peal v. *Peal* (1930), case of, 197, 198 n.
Permanent Court of International Justice, Reports of, 147
—— —— —— and majority decisions, 34
—— —— ——, independence of, 148
—— —— ——, judgments and advisory opinions of, 160–82
Perry v. *Equitable Life Assurance Society of U.S.A.* (1929), case of, 5, 15, 16
Poland and Czechoslovakia minorities question, action of Council of League regarding, 27
Polish-Lithuanian dispute (1922), 39
Polish Loan Bank case, the, 111, 112
Prevention of Accidents (Dockers) Convention (1929), revision of, 54, 55, 56, 57
Prince von Pless, administration of the: preliminary objection, 173, 174
Private law, duty of states to enforce impartially, 135
Protection, diplomatic, recognition and non-recognition as affecting, 72, 73
—— of industrial, literary, and artistic property, recognition and non-recognition in relation to, 73

Re Arrow River and Tributaries Slide and Boom Co. Ltd. (1932), case of, 148, 149
Re Barnett's Trusts (1902), case of, 14
Re Higginson & Dean (1899), case of, 9, 10
Re Lorillard (1922), case of, 14
Re Regulation and Control of Radio (1932), case of, 149
Re Russian and English Bank (1932), case of, 189, 190
Re Russian Bank for Foreign Trade (1933), case of, 7, 15, 190, 191
Re Tea Trading Co., K. & C. Popoff (1933), case of, 191
Re Vocalion (Foreign) Ltd. (1932), case of, 14, 15, 200–2
Re Wells, Swinburne-Hanham v. *Howard* (1933), case of, 9, 10, 11
Rebus sic stantibus and revision of conventions, 43
Recognition in international law, 66 *et seq.*
Representation on Council of League, rights of interested state to, 19–29
Reprisal, boycott as, 125
Republic of France v. *Pittsburg Steel Export Co.*, case of, 110
Responsibility of states in respect of boycotting, 128 *et seq.*, 134
Reviews of books, 204–24
—— current periodicals, 225–31
Revision of International Labour Conventions (C. Wilfred Jenks), 43–64
Revolutionary body, recognition of, in relation to validity of its acts, 1, 2
Right to require return of citizen from abroad to give testimony, 151, 152
Rothschild v. *Egyptian Government*, case of, 113
Rudoyevitch v. *Rudoyevitch*, case of, 200
Russian and English Bank v. *Baring Bros. & Co.* (1932), case of, 7, 9, 187–9
"Russian Bank Cases", Dissolution of foreign corporations in private international law in the light of the (B. A. Wortley), 1–17, 184
Russian Commercial and Industrial Bank v. *Comptoir d'Escompte de Mulhouse* (1925), case of, 2, 3, 9, 183 n.
Russian Government responsibility in relation to Communists, 133, 134
Russian Trade Delegation at Warsaw v. *Fajans*, case of, 115, 116
Russian Trade Delegation v. *Tessini and Malvezzi*, case of, 116

Sabotage cases in the United States, arbitration of, 181, 182
Sale, law of, international code of (H. C. Gutteridge), 75–88
Savoy, Upper, Free Zones of, case of, 160–5
Sea Insurance Co. v. *Rossia Insurance Co.*, case of, 4, 13
S. of S. of Canada v. *U.S. Alien Property Custodian*, 149
Sino-Japanese dispute before the Council of the League, 23, 29
—— —— ——, Special Assembly and, 33
Société le Gostorg and U.S.S.R. v. *Association France Export*, case of, 114, 115
Soviet legislation, interpretation of, by House of Lords, 2–5
S.S. May v. *The King*, case of, 149
S.S. Queen City v. *The King*, case of, 149
State immunity from proceedings in foreign courts (G. G. Fitzmaurice), 101–24
Stimson doctrine of non-recognition (Arnold B. McNair), 65–74

Stone, Julius, The rule of unanimity: the practice of the Council and Assembly of the League of Nations, 18–42
Syria, Mandate for, in relation to trial of foreigners, 97

Torni, The, case of (1932), 193–5
Treaties and Acts of Congress, 150
Treaty revision, experience of I.L.O. in regard to general question of, 64
Turkey and Iraq frontier dispute, procedure of Council as to rule of unanimity in deciding, 21, 22
——, boycotting by, 126
Turkish Purchases Commission case, 104, 111

Unanimity, the rule of: practice of the Council and Assembly of the League of Nations (Julius Stone), 18–42
Unification of laws of sale, problem of, 77–80
Union of South Africa v. *Herman Grote*, case of, 114
United States and Sweden, arbitration case between, 180, 181

Vardy v. *Smith*, case of, 199, 200
Versailles Treaty, "Committee of Experts on Article 408" of, 143–5
Vœux of the Assembly as contrasted with "decision", 35, 36
Voluntary submission, theory of, in relation to foreign state immunity, 104 *et seq.*

Wilkins v. *Wilkins*, case of, 198
Winding up of English branch of foreign corporation, principles applicable to, 13, 14, 15
Workmen's Compensation (Industrial Diseases) Convention (1925), proposed revision of, 54, 56, 57
Wortley, B. A., Dissolution of foreign corporations in private international law in the light of the "Russian Bank Cases", 1–17

Zigurds, The, case of (1932), 195, 196

PRINTED IN
GREAT BRITAIN
AT THE
UNIVERSITY PRESS
OXFORD
BY
JOHN JOHNSON
PRINTER
TO THE
UNIVERSITY

1957

1959

88-1